Meeting Of The

# ASSEMBLY INTERIM COMMITTEE
# On
# MUNICIPAL AND COUNTY GOVERNMENT

## TRANSCRIPT OF PROCEEDINGS

~~On the Subject of the~~

## IMPROVEMENT ACTS OF 1911-13-15

Sacramento, California
September 24, 1962

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Thomas H. Willoughby, Committee Consultant
Mrs. Cristine B. Trask, Committee Secretary

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ASSEMBLY INTERIM COMMITTEE
on
MUNICIPAL AND COUNTY GOVERNMENT

Clark L. Bradley, Chairman

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September 24, 1962
State Building
Los Angeles, California

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Present:

Clark L. Bradley, Chairman
Don A. Allen, Sr.
Carl A. Britschgi
Frank Lanterman
Eugene G. Nisbet
Vincent Thomas
Chester E. Wolfrum

Staff:

Thomas H. Willoughby, Committee Consultant
Mrs. Cristine B. Trask, Committee Secretary

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# IMPROVEMENT ACTS OF 1911-13-15

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CHAIRMAN BRADLEY: The Interim Committee on Municipal and County Government will come to order. I would like to begin by introducing the members of the Committee who are here. On my left we have Assemblyman Vince Thomas from San Pedro; next to him Assemblyman Carl Britschgi from Redwood City; on my immediate left is our Committee Consultant, Thomas Willoughby; on my immediate right is our Committee Secretary, Mrs. Cris Trask; next to her is Assemblyman Don Allen from Los Angeles; and next to him is Assemblyman Gene

Nisbet from Upland. We do expect also to have with us Assemblyman Frank Lanterman, Assemblyman Flournoy, Assemblyman Wolfrum, Assemblyman Hegland, and Assemblyman George Brown.

The purpose of our meeting this morning is to continue a study which this committee started in Sacramento in June on the subject of the 1911-13-15 Improvement Acts, as they have been used in connection with subdivision and land development. We have expanded the scope of this hearing to include consideration of special districts- both those formed under general enabling acts and those formed by special act - as these public agencies have been used in land development situations.

What we are primarily interested in from the witnesses who will appear before the Committee today and tomorrow is their testimony about their experience and their background dealing with the Improvement Acts and any additional information which they may be able to give the Committee about the special district situation which I have mentioned. We welcome suggestions for improving the Improvement Acts and special district statutes. Our objective is to compile as complete a record as possible for the benefit of the committee in compiling its final report.

I presume everyone understands that this is an open hearing. Everyone is here voluntarily; we do not take any person's testimony under oath. Under a very special circumstance, there will be three witnesses here under subpoena at their own request. With that as a basis of our understanding, we will proceed.

We will commence our hearing this morning by calling on the Attorney General's office through Mr. Herbert Wenig, Assistant

Attorney General, who has a very brief statement he wants to make at this time. Mr. Wenig.

HERBERT WENIG, Assistant Attorney General: Mr. Chairman and gentlemen of the Committee, my statement is intended to provide some continuation from the hearing which we had in Sacramento, and to advise the Committee of developments since that hearing.

The general problem that we are faced with is the use to which land developers are putting the three Improvement Acts. Generally, when a land developer subdivides land, he is responsible for putting in the improvements required by local ordinances, such as streets and sewers, curbs, and certain other off-site improvements. In the past this has been done through conventional financing obtained through savings and loan associations and banks. At present, however, we find, in certain sections of the State at least, that land developers are finding the use of the special assessment districts increasingly attractive. In the report which we presented to the Committee we raised the fundamental question whether these acts were intended by the Legislature to provide this type of financing for land developers. This is a matter of policy. It is not unusual today for the Federal Government and certain states to provide financial encouragement to land developers and to encourage the placement of industrial plants in various areas. We have the Small Business Administration; we have Federal aid in connection with housing for the aged; we have indirect aid, such as the FHA, the VA. All of this helps the home builder and land developer. In California, however, we have had no direct affirmative action in this regard; and the fundamental question, it seems to us, is whether public credit is to be used in this way.

The second objective of our presentation in Sacramento was to bring to your attention the results of the investigation of our Investment Frauds Unit with respect to certain abuses in the use of these special assessment districts. The outstanding "abuse", if you will, was the fact that land developers were applying an interpretation of the 1913 Act under which they were able to obtain financing of off-site improvements - sewers, streets, and so forth - on the grounds that the district was acquiring these improvements as they were being constructed. The developers used the procedures for purchasing, or "acquiring" an installed improvement but used the theory that they could do so on a progressive basis or on a piecemeal basis. In this fashion the safeguards which are present in the Act in situations where an improvement is being constructed, were avoided-such as the requirement of public bidding, the putting up of a performance bond, and mechanics and labor lien bonds. We found in one outstanding case in northern California that one builder had been able to siphon off some $200,000 of funds by using this procedure. When I say "funds" it is important to add to this the adjective "public" funds. We feel that certain developers do not have a proper regard for these funds as public funds; instead they have somewhat of a cynical attitude that this money is their own. This has led to an unsensitivity (if there is such a word) with respect to the public character of these funds so that you find certain conflicts of interest, such as the fact that under the "acquisition" theory developers have paid their own construction company for construction of public improvements.

Other abuses that we found involved the fact that there was no independent engineering and fiscal control on a project, nor an adequate determination of the economic feasibility of the development in the first place.

The recommendations which we made to this Committee concern the shortcomings that I have just mentioned. There is a need for another look at this acquisition theory. In any case there is the need for the safeguards of performance bonds, public bidding and materialmen's bonds. There should be standards for determining the value of the improvements. There is a need for some independent engineering and fiscal control. There should be an insistence on the concept that bond proceeds constitute public monies and therefore are to be regarded as a trust and to be surrounded with all the safeguards which the law gives trust funds. There should be some means of determining economic feasibility of a project. There is a need for protecting prior encumbrances. We mentioned to you several instances where savings and loan companies woke up to find out that instead of being in a first position they were in a second position, with the bonds first. We also suggested that the Committee might give some consideration to the possibility that if each separate district receives extensive credit on its own, the ability of an entire area to bond itself for desirable improvements might be rapidly used up. Perhaps, therefore, there ought to be some system of priority for public improvement projects. Finally, at the hearing in Sacramento we said that we should try and see what can be done with the tools at hand until there could be fuller legislative consideration of this whole situation.

With respect to the "acquisition" theory which has brought about a number of the abuses I mentioned, we received a request from the Chairman of this Committee to determine the following question: "Whether a political subdivision acting pursuant to a resolution of intention adopted under the Municipal Improvement Act of 1913 'to acquire' property or improvements may proceed to authorize the issuance of bonds and to disburse the proceeds of said bonds in advance of completion and acceptance of such improvements by the proper governmental authority". The opinion which is in response to that request is No. 62/167 and our conclusion was stated as follows:

> A political subdivision acting pursuant to a resolution of intention adopted under the Municipal Improvement Act of 1913 may not authorize the issuance of bonds and disburse the proceeds for the purpose of "acquiring" capital improvements which are not described as being installed in the engineer's report required by Streets and Highways Code section 10204.

Another opinion of our office was issued as a result of a situation in Santa Cruz County. Five instances were discovered where land developers were using bond monies to improve the property itself, as distinguished from construction of off-site improvements. In the opinion we rendered to the County Counsel we stated that the law would only authorize on-site improvements, grading, etc., where there was a reasonable and necessary connection with the doing of the off-site work, such as the placement of streets.

Following the suggestion which we made to the Committee, we prepared a circular letter to all district attorneys, county counsels and city attorneys. The testimony at Sacramento had indicated that lack of control and lack of proper understanding of the Acts arose in smaller counties where they didn't have an adequate staff to assist them. It was in order to alert the smaller counties and counties in which there had been rapid development and use of these special districts, that we directed our circular letter to the district attorneys and county counsels. A copy of our letter, together with the accompanying two opinions which I have mentioned has been provided to the Committee.

BRADLEY: Thank you, Mr. Wenig. As I understand it, that is the extent of your statement at this time and that later on you and your staff will be given additional time.

WENIG: That's right, Mr. Chairman.

BRADLEY: Thank you very much. I would like at this time to acknowledge receipt of the Attorney General's Opinion No. 62/167 and to express our appreciation for the Attorney General's prompt response to our request.

At this time I will ask Mr. Laughlin Waters to come forward. I believe he has one or two witnesses he would like to appear with him.

LAUGHLIN E. WATERS, Attorney at Law: Mr. Chairman and members of the Committee, I am Laughlin E. Waters. I am an attorney at law and a partner in the firm of Nossaman, Thompson, Waters and Moss. I do not have a statement to present to the Committee, but I have two witnesses who I believe will be helpful to the Committee in its deliberations. The first gentleman I would like to present is Mr. Jack Rogers, Vice President of the First California Company, an underwriting company that has extensive experience in both corporate and municipal bonds. Mr. Rogers has a statement and I will defer to him for this phase of the presentation.

JACK B. ROGERS, Vice President, First California Company: I appreciate your hearing me as I believe that I have information here which will complete the story you now have on hand. I attended the June 18-19 hearing in Sacramento and I feel that you have adequately developed the operational and functional aspects of the Improvement Acts and the utilization of those acts in northern California. No purpose would be served at this time by duplicating part of the record.

My experience in the past fifteen years since World War II has been largely confined to the 1911 Act. As an industry we are acquainted with it; we know it and understand it; and it adequately provides the various improvements for the communities in southern California. The importance of the 1911 Act and the other acts to these communities cannot be overstated, for there is no other way in which these types of improvements can be provided to cities and counties in this State in a manner that is both timely and economical.

These acts are highly selective in the impact of their assessments since the cost of each improvement is imposed only upon those people who directly benefit from it. A typical example in southern California is the manner in which the 1911 Act has been employed in Redondo Beach. Redondo Beach is one of the older residential communities in southern Los Angeles County. Since the end of the war substantially the whole city has been sewered by means of the 1911 Act proceedings. In recent years there has been a continuing program to upgrade street improvements throughout the city by means of the 1911 Act. As rapidly as petitions for improvements are filed with the city, 1911 Act proceedings for the requested improvements are undertaken. As a result of this program, Redondo Beach, during the course of a few years, will have brought most of its street improvements up to modern standards. Redondo Beach, like most older communities, does not have the type of resources to carry on an extended street improvement program. Were it not for the 1911 Act proceedings, Redondo Beach would have difficulty maintaining its position as a desirable residential community. Redondo Beach is not the only community thus benefited. The great bulk of southern California assessment proceedings, even in the larger cities and counties, have followed the same pattern. Their purpose has been to provide new, or better, street improvements in existing communities and neighborhoods. In recent years a few local entities have made use of the 1913 Act.

With respect to special assessment proceedings, the 1961 Taxpayers Guide for the County of Los Angeles indicates approximately 555 projects where assessment bonds were outstanding. About 87 of these, or 15½ per cent, were issued as the result of a 1913 Act assessment. About 468, or 84½ per cent, were issued under the 1911 Act. To my knowledge the City of Los Angeles has used the 1911 Act exclusively. Based upon my experience, I would say that approximately 95 per cent of the proceedings in southern California are taken up under the 1911 Act. Elsewhere in southern California the use of the 1913 proceedings has been limited. In any event, selection of the particular Act to be used has been a matter of local choice, based on community background and experience. As far as the Improvement Bond Act of 1915 is concerned, no use has been made of this in southern California. This again is a matter of choice for each community.

Mindful of the testimony of the Attorney General before this Committee in June during its hearing in Sacramento, we are concerned not only as an industry but as an organization which has a sense of public responsibility and obligation. We are therefore working constructively to help correct the abuses which have been cited. While some correction must be made, we wish to stress the importance that in so doing the Acts should not be so overburdened that they cease to be useful instruments for local communities. To that end we have secured copies of the transcript of the hearing in Sacramento and made them available to the various members of our industry. We have discussed the problems among ourselves and with bond counsel, both in northern and southern California, with a view to working out the appropriate language that can be introduced at the forthcoming session of the Legislature. For example, we as an industry are in accord with the recent opinion of the Attorney General that the 1913 Act should be amended to clarify the definition of "acquisition" so as to limit it to the acquisition of existing facilities. There is also agreement that provisions should be added to the 1913 Act requiring bonds for competitive bidding in construction contracts and furnishing of completion bonds, similar to those provisions now found in the 1911 Act. There is further agreement that provisions can be enacted whereby encumbrancers can conveniently inform themselves concerning the existence of proposed or completed assessment proceedings or assessment liens. It will be our purpose, therefore, between now and the commencement of the legislative session in 1963 to work closely with the Committee staff, the office of the Attorney General, members of the Committee and other interested parties, so that these points can properly be considered and appropriate language drafted that will meet the needs.

Because of the importance of these Acts to local communities, great care must be exercised to make certain that when they are corrected they are not so changed as to render them of no future value for use to communities because of provisions which demand increased time, expenses, and constant publication of notices. Should you or your Committee staff, or the Attorney General's Office, desire to call on us for any further statement, we will be available to meet you.

BRADLEY: Mr. Allen.

**ASSEMBLYMAN DON ALLEN**: Has either the 1911 or the 1913 assessment procedure been used to any extent in southern California by land developers? My impression was that, in the main, these statutes had been used to benefit and to service public corporations rather than private land companies.

ROGERS: The 1911 Act has been used principally by the public entities and not land companies. The reason is that here in southern California local governments have required that the subdivider use his own funds or funds of a lending institution to put in the public improvements in new subdivisions. I believe that the representative from the City of Los Angeles could probably answer that question a little better because I understand that from time to time they have had subdividers come to them with that request.

ALLEN: You testified that about 95 per cent of the financing had been by the 1911 Act and about 5 per cent by the 1913 Act. That 5 per cent, was it financing which was used by governmental agencies also, rather than by land developers?

ROGERS: That's right.

BRADLEY: Mr. Lanterman has a question.

ASSEMBLYMAN FRANK LANTERMAN: Mr. Rogers, would it seem reasonable to you to tighten up the Act itself, in accordance with the recommendations that you have given, and also to require the local agencies to have a uniform procedure for approving such improvement projects? In other words, it seems that there are two things that we have to do here: one is to fix the Act and the other is to require cities and counties to proceed under at least minimal safety requirements. If certain counties in the north have not followed such safety procedures, which are now optional, then it is simply a matter of direction by the Legislature that they proceed to do so.

ROGERS: You are speaking of the 1913 Act, Mr. Lanterman?

LANTERMAN: Yes.

ROGERS: I feel that by changing certain words or adding sections, etc. the statute will be tightened up. Such changes probably will simplify it to the point where it can be understood by all local agencies, so that there would be no chance of disagreement or misinterpretation.

ALLEN: Mr. Chairman, may I ask one final question?

BRADLEY: Mr. Allen.

ALLEN: I was schooled in the uses of the 1930 Act by Bill Neal, the late City Attorney of Los Angeles, who had extensive knowledge on this subject and some strong opinions on the use of that statute. He felt that this special assessment act was supposed to have been the tool of the governmental agencies, but under no circumstances was it to supplant the F.H.A. procedure or any other procedure to acquire new and raw land. A favorite expression of

Mr. Neal's was that the 1913 Act could be used to create a debt without a debtor. In other words, under ordinary circumstances the debt would be secured by a lien on the developed property, which in turn would be fully able to support it; but under these new circumstances there is no guarantee that the raw land will be able to support such a lien. I recall Bill Neal saying that the only safeguard for the public was that these Acts should be retained entirely for the use of local entities and under the direct supervision of local entities, and not for new developments by private agencies. Is that your theory too?

ROGERS: Bill Neal, I might say, was a personal friend of mine and I share quite a bit of his beliefs. However, there has been an increase in the use of the 1913 Act by private developers. This in itself is not bad as long as the practice is not abused. I believe that the Act could be tightened up so that both private developers and municipalities could use it safely.

ALLEN: To your knowledge, when was this Act first used by private developers?

ROGERS: I couldn't answer that.

ALLEN: It has been relatively recently, hasn't it?

ROGERS: Yes, it has been recently, but I couldn't say when.

ALLEN: In your business you and your colleagues have, at least up to now, dealt mostly and mainly with cities rather than private developers. Isn't that true?

ROGERS: Yes, that is true.

BRADLEY: Mr. Rogers, specifically, just what is the position of the First California Company? Are you purchasers of the bonds or....

ROGERS: Yes. We underwrite these various improvement districts. We work with the contractors. We finance contractors while they are carrying on their work. At the conclusion of the work we take over the warrant and send the bills out to the various property owners. We eventually acquire the bonds representing unpaid assessments and we sell these to the public.

BRADLEY: I gather that your position in regard to the 1911 Act is that there are no particular major changes or suggestions that you would like to make to the Committee. Did you have in mind any suggestions in the way of minor changes or clarifying amendments, even though you are obviously generally very well satisfied with the 1911 Act?

ROGERS: No, we have nothing to bring up at this time.

BRADLEY: Then the suggestions that you have made to the Committee relate solely to the 1913 Act?

ROGERS: Yes.

BRADLEY: Your approach is what we might call "preventive medicine" - to prevent private developers from bringing the alleged abuses of the 1913 Act into southern California, which does not have them at this time.

ROGERS: Should the 1913 Act be resorted to with increasing use in the future, we want to be sure that it is a correct and usable instrument.

BRADLEY: Mr. Britschgi, do you have a question?

ASSEMBLYMAN CARL BRITSCHGI: Mr. Rogers, you said that your company handled the paper after the contractors had been awarded the contract. Is there a fixed fee by your company, or by the industry, for handling this paper?

ROGERS: No. We bid a fixed price to the contractor, which we are willing to pay not only for financing his contract while he does the work, but also for taking over the paper work and that sort of thing. Our bid is based on our estimate of the value of the property which will be security for the bond itself.

BRITSCHGI: To the best of your knowledge there is no trouble in this particular area?

ROGERS: No. My primary reason for coming before you at this time was to give you a picture of what we do down here in southern California.

BRADLEY: Mr. Rogers, we appreciate your testimony very much. Mr. Waters, do you have another witness?

WATERS: Yes. I have a partner here from my law firm, Mr. Franklin T. Hamilton, who is an expert, a technician if you please, in this particular field. Mr. Hamilton has had a long background of experience in this particular area and I believe that he may be of some help to the Committee.

BRADLEY: Before we hear from Mr. Hamilton I would like to introduce two additional members of the Committee, who have arrived - Assemblyman Frank Lanterman, of La Canada, and also Assemblyman Chet Wolfrum, of Los Angeles. Now Mr. Hamilton, you may proceed.

FRANKLIN T. HAMILTON, Attorney at Law: As has been stated, in southern California we have used predominately the 1911 Act and it has been used mainly in the area of providing street improvements to existing communities and neighborhoods. We have made no widespread use of the 1913 Act, nor have either of the Acts been used to any considerable extent to provide subdivision improvements. There has been some increase in the use of the 1913 Act; locally, this has been principally by the County of Los Angeles, the reason being that until recently the 1911 Act had very limited provisions for the acquisition of rights-of-way required for the construction of street improvements. Thus, the County of Los Angeles found it necessary to use the 1913 Act for that purpose, and to my knowledge it probably has been the single largest user of the 1913 Act in southern California. I wish to reiterate, however, that the Act has not been used for subdivision improvements.

To provide a little additional perspective on southern California practice, I would like to point out that the dollar cost of these improvement projects has been comparatively modest, particularly when measured against some of the projects which were the subject of the Attorney General's investigation. I don't have statistics available, but from my own fifteen years' of experience I would hazard to guess that the average street improvement proceeding in southern California is in the range of from $50,000 to $75,000. I would hazard the further observation that the mean is about $25,000 or $30,000. In other words we've used the 1911 Act on some extremely small projects. I have seen it used on projects in the range of from $5,000 to $10,000.

I concur with Mr. Rogers' observations, and I think that there is general agreement among southern California bond counsel and bond dealers that legislation can be worked out which would remedy the great bulk of abuses which were cited in the Attorney General's report at this Committee's June hearing. Southern California bond counsel and bond dealers would cooperate with any such effort.

It is my understanding also that this Committee is interested in the possibility of weeding out dead wood in the various street acts and in the possible consolidation of some of these acts. There are two or three acts which are in the Streets and Highways Code and which are rarely, if ever, used. It might be very proper and desirable for this Committee to investigate the desirability of repealing those acts. The acts which might be the subject of investigation by this Committee with the view to repeal, would be the Street Opening Act of 1889, which commences at section 3200 of the Streets and Highways Code; the Street Opening Bond Act of 1921, which commences with section 3400 of the Streets and Highways Code; and the Street Improvement Act of 1913, which commences at section 7000 of the Streets and Highways Code. With respect to this last act, I want to emphasize that this is not the 1913 Act which has been the subject of so much discussion before your Committee. We have two 1913 Acts on the books and this is the other 1913 Act.

A good index of the use of these types of statutes are the number of amendments to them. The widely used and popular acts will have amendments at every session of the Legislature. These amendments develop naturally, as people who use the acts find inadequacies and shortcomings in them. With respect to the three Acts which I have just mentioned, there have been only occasional amendments since they were enacted in 1941.

Another act which possibly might be considered for repeal is the Change of Grade Act of 1909, which commences at section 8000 of the Streets and Highways Code. That statute might be consolidated with similar provisions found in the 1911 Act.

One change which would save cities a considerable amount of publication expense would be an amendment to section 1773 of the Labor Code, requiring the publication of prevailing wage schedules on projects. This suggestion might well be of a controversial nature; however, insofar as the cities and the issuing agencies are concerned this requirement serves no useful advantage.

A possible consolidation which this Committee might consider profitable to investigate would be in the area of maintenance district acts. The 1911 and the 1913 Improvement Acts are construction and/or acquisition acts. They provide a means whereby a municipality may acquire or construct a project. Ordinarily they provide no means for the maintenance of that project after it is constructed. The 1911 Act does have a chapter on that, which duplicates in part some other maintenance acts. I would suggest that the Committee might direct its efforts at consolidation towards two goals. The first would be to develop a maintenance district act, which would be applicable to any type of improvement, including street lighting. Street lighting is by far the principal use of a maintenance district, but there are other facilities which require continuing maintenance, such as sewers, water facilities, and other "active" improvements. Secondly, such an act should be adaptable so that it could be used separately, apart from the main improvement proceeding, or so that both procedures could be consolidated and carried on concurrently.

The Acts, which might be the subject of consolidation with respect to maintenance, are: The Improvement Act of 1911, sections 5600-5630, Streets and Highways Code, and also sections 5820-5824; the Street Lighting Act of 1919, commencing at section 18000 of the

Streets and Highways Code; the Street Lighting Act of 1931, commencing at section 18300 of the Streets and Highways Code; the Municipal Lighting Maintenance District Act of 1927, commencing at section 18600 of the Streets and Highways Code; and the Highway Lighting District Act, commencing at section 19000 of the Streets and Highways Code.

Another area of possible consolidation would be the change of grade acts. At the present time there is one act in this area which is rarely used. The 1911 Improvement Act has comprehensive provisions for change of grade (section 6000-6123, Streets and Highways Code). A separate and independent act is the Change of Grade Act of 1909, commencing at section 8000, Streets and Highways Code; it is rarely used. Also with respect to change of grade, at the present time the 1913 Improvement Act incorporates by reference wholesale sections of other acts, principally the 1911 Act. This makes it a difficult act for the uninitiated to use. In particular many city attorneys and local attorneys find great difficulty in comprehending that act, because of its widespread incorporation by reference of other provisions. Thus it would appear to me that the Committee might consider the desirability of making the 1913 Act a completely self-contained act in this regard. This would make it more intelligible to the average person who is required to examine and use it.

With respect to the 1911 Act, which is the act most widely used in southern California, it would appear that there are some changes which could be made to eliminate dead wood and to effect needed consolidation. The provisions governing contributions by a public agency to pay a portion of the cost of a project are now scattered throughout the act; they are contained in sections 5119, 5125, 5370, 5375, 5582, and 5583. On occasion this has caused some difficulty, not only to the uninitiated, but to special bond counsel. It might be well to bring all the contribution provisions of the 1911 Act into a single chapter.

In the area of repeal it might be desirable to repeal the provisions of the 1911 Act, providing for frontage assessments. Frontage assessments are an anachorism, and to my knowledge no current 1911 Act proceeding has been taken using the frontage assessment method. All other acts use the assessment district approach. To understand this recommendation requires a little historical background. In the early days of the special assessment, the Legislative Body did not create a district which was required to pay the cost of the improvements. It simply provided that the cost of an improvement along a particular street would be assessed against the abutting property. It was up to counsel to decide what property abutted this street and what property was therefore subject to assessment. It was obvious to everybody that this was not an entirely satisfactory method of determining who should bear the burden of the assessments. Modern day practice uses the assessment district method exclusively, which fixes and defines with certainty the entire area which is subject to assessment. Thus it would appear that possibly the frontage assessment provisions of the 1911 Act could be safely repealed. These provisions are found in sections 5015-5017 and in sections 5315-5327 of the Streets and Highways Code. The assessment district provisions, which might well be made mandatory, are found in sections 5180-5182 and in sections 5340-5344 of the Streets and Highways Code.

Another area of possible repeal would be the chapter in the 1911 Act relating to assessments to relieve property owners. During the 1920's it was the practice to acquire and improve major city thoroughfares and to assess the entire cost of those improvements against abutting property, sometimes going back as much as two or three blocks from the main thoroughfare. Examples of that in Los Angeles County are Olympic Boulevard and Ventura Boulevard, which were improved by special assessment proceedings. During the depths of the depression, however, it was found that many such assessment areas were over-burdened. Furthermore, it was felt that it was inequitable to compel such areas to pay the entire cost of major city thoroughfares. The chapter to which I refer provided a method whereby a city could relieve those districts of a portion of the burden of the assessment. To my knowledge there have been no situations of this type which have occurred since the end of the war. The Committee might well feel that this is an historical anachorism, which might be safely repealed.

With regard to all of the changes I have suggested, I might state this: the 1911 Improvement Act as it now exists is a very usable tool. It is not a complicated act to use; it is a workable act. I can't honestly state that I think that any really extensive amendments are required. The changes which I have indicated are desirable but not essential.

There are also the following relatively minor technical amendments which ought to be made. First, the 1911 Act should be mandatory in its requirement that the Legislative Body review plans and specifications. At the present time there is no mandatory requirement that a Legislative Body have the plans and specifications for a project before it orders the work. I might add, however, that it is the almost universal practice of public agencies to require such plans. It might be desirable, however, to make this requirement statutory.

The second area where there might be clarification is in regard to the provision for liquidated damages, which was added at the last session of the Legislature. This is a provision which permits a Legislative Body to require a contractor to pay liquidated damages in the event he fails to complete construction within the time fixed in his contract. The present provisions are quite vague as to the disposition of any damages which a city might collect, i.e., whether those damages should go into the general fund of the city or whether they should be used to reduce the amount which will be assessed against property owners. I believe that clarification might be desirable in this area.

Another area for technical amendment is the bid security requirement. At the present time the Act requires the contractor to furnish bid security in an amount not less than 10 per cent of his bid. The security must be evidenced either by a certified check or by a bid bond. Not infrequently bidders will submit a cashier's check and their bid will be considered irregular because they used a cashier's check rather than a certified check. Here again I think it might be desirable to authorize a cashier's check as bid security.

The 1911 Act also has an area of uncertainty with respect to payment of the Treasurer's cost of collection. At the present time it provides that the expense of collecting and disbursing payments on outstanding 1911 Act funds may be included in the incidental expenses. It also states that if the city doesn't pay those expenses it is liable to the Treasurer. Many attorneys have looked at this provision and tried to figure out under what conditions and circumstances a city could be liable to its Treasurer. I think this provision might be clarified. In addition, the bond form which is set forth in the 1911 Act should be clarified. At the last session there were some changes made in the dating of the bonds and by inadvertence one paragraph of the bond form was not amended, and that should be clarified.

The various code sections to which I have referred in my remarks on technical amendments are as follows: on the ordering of plans and specifications, section 5130, Streets and Highways Code; on liquidated damages, section 5254.5, Streets and Highways Code; on bid security, section 5254; the Treasurer's right to recover against the city, section 5360.1; and on the bond form, section 6460.

WATERS: I might add that I believe that this Committee has already performed a salutary function in bringing the use of the 1911 Act proceedings, the 1913 Act proceedings, and the 1915 Act bonds to light. I think that disclosures such as has developed in this Committee's hearings will probably do as much, or more, than any legislation in this area. I do, however, concur in the desirability of legislation to remedy the large number of abuses which have been disclosed primarily in the use of the 1913 Act in subdivision improvements.

BRADLEY: Thank you, Mr. Hamilton.

I think it might be well for me to state at this time as a matter of policy that it is not the intent of the Committee to replace these acts. We are quite satisfied that such an action would not be beneficial and, therefore, we are thinking only in terms of modifying and tightening up the existing statutes.

I believe Mr. Britschgi has a question.

BRITSCHGI: I concur with your thinking in the area of plans and specifications, but I also see a problem. Where do you propose to get the money to draw up the plans and specifications to start with?

HAMILTON: It appears to me that the answer to that question is primarily in the area of coordination. If there is coordination between the property owners who want the improvement and have requested its construction, and the engineers, whether they be city engineers or specially employed engineers, and the city staff...

BRITSCHGI: As I recall, our City Attorney would tell the City Council that it couldn't spend money on a private project, such as an improvement project initiated by a group of citizens under the 1911 Act. Let's assume that a group of citizens submit a petition for an improvement project, but when the plans and specifications have been drawn up the group finds that the cost will be excessive, and they abandon the project. In that case who pays for the plans and specifications?

HAMILTON: Under the present provisions of the acts, when a special assessment proceeding is abandoned prior to completion, such costs must be borne by the agency, in the absence of any special provision to the contrary. There is a further provision in the statutes that if, at a later date, a proceeding is commenced for the construction of the same improvements in that area, the costs of the prior abortive proceedings may be included in the incidental expenses of the second proceeding. That is one method whereby a city may reimburse itself. A second method which is used by some cities is that when the proponents of an improvement come before the City Council to make their request, they are required to make a deposit with the city to cover the estimated cost of the plans and specifications. That deposit will be refunded if the proceedings are carried through to completion. If the project is completed the engineering and other incidental expenses will be apportioned in the assessment. If the proceeding fails the city may then resort to the cash deposit to reimburse itself. I might add that in southern California this situation has not been much of a problem. Our larger entities, such as the City or the County of Los Angeles, require a petition signed by a very substantial number of property owners - about 60 per cent or more. Thus they are assured that when they commence a proceeding there is little likelihood that it will be abandoned because of a majority protest. I would say, therefore, that the problem has not become acute, although it does exists.

BRADLEY: Mr. Hamilton, the Committee appreciates very much the presentation that you have made.

HAMILTON: Thank you.

WATERS: Thank you, Mr. Chairman, and members of the Committee. We appreciate the opportunity to be with you, and we will hold ourselves available for any help that we might be able to extend to the Committee.

BRADLEY: Thank you.

Mr. Donald C. Tillman, please. You may proceed, Mr. Tillman.

DONALD C. TILLMAN, President of the Board of Public Works, City of Los Angeles: Gentlemen, my name is Donald C. Tillman, President of the Board of Public Works, City of Los Angeles.

The City of Los Angeles is appreciative of this opportunity to appear before your Committee. We had the pleasure of auditing the Sacramento hearings in June; and we think the Committee should be commended for the way in which the hearings were conducted and for the promptness with which the transcript was made available to those of us who are so vitally interested in the subject of assessment proceedings.

In our testimony here this morning we hope to touch upon the history, recent development, present practice and suggested changes in the Improvement Act of 1911 (Division 7, Streets and Highways Code) as it pertains to the City of Los Angeles. We will intentionally confine our remarks primarily to the 1911 Act (rather than the Municipal Improvement Act of 1913 or the Improvement Bond Act of 1915 or any of the other special Acts) because our experience is with that Act. We have used the 1911 Act many thousands of times. We have used it since its inception; and we have used it practically to the exclusion of any other similar Act. In contrast, we have never used the Municipal Improvement Act of 1913 or the Improvement Bond Act of 1915.

We are now processing to completion about 400 1911 Act projects a year, representing an actual dollar volume of about

$5.5 million. For the year just ended, this class of work represented about 20% of the dollar volume of all sewers, storm drains, paving and other street improvements completed in this City. And this is probably at least forty per cent of the total assessment act volume in the whole state. With such a large volume of activity in this field, and because of the wide variety of terrain and other factors here in Los Angeles, we have undoubtedly been exposed now to most of the problems that can conceivably arise under the 1911 Act. New problems, of course, continue to arise.

The Committee may wonder at this point why we haven't used the 1913 Act. The answer is simple. The 1911 Act seems to suffice for all our needs. It has been extensively litigated. We feel we are on safe and familiar ground. This is not to say that we regard the 1913 Act as unsound legislation, or that we think it has no possible application here in Los Angeles. Indeed, we think that properly administered, it may in some ways have advantages over the 1911 Act. But so far we have had nothing that could not be satisfactorily handled under the 1911 Act. In recent years, we have been approached once or twice with suggestions that we use the 1913 Act, but the projects never materialized. However, we have one project now in the formative stage where, I understand, the developers are very seriously considering the 1913 Act procedure...or at least seriously weighing the comparative merits of the 1913 Act versus the 1911 Act.

Before I get into proposed legislative changes in the 1911 Act, I want to briefly mention that we've found much that could be done administratively. In the last couple of years we've changed many of our procedures; we've reprinted many of our forms; we've published an informative brochure for distribution to the public. Much remains to be done along this line, but already the results are beginning to show in decreased processing time, better informed petitioners, fewer protests, better public relations, and decreased costs. Your Committee undoubtedly recalls from the testimony at the Sacramento hearing that changes in the Special Assessment Investigation Limitation and Majority Protest Act of 1931 were recommended. Some suggested it should be abolished. We mention this only because it may be of interest to this Committee to know that the City of Los Angeles has taken advantage of the provision in that Act (Sec. 2804, Streets and Highways Code) eliminating from its application any charter city which has complied with Section 17, Article XIII of the California Constitution. The City, in 1954, adopted a "Public Convenience and Necessity Determination Ordinance" which provides a hearing (it is joined with the regular protest hearing provided in the 1911 Act) to find and determine whether public convenience and necessity require the improvement which is contemplated under the ordinance of intention. Upon conclusion of the protest hearing under the 1911 Act and this ordinance, if the Council denies the protests and finds by a four-fifths vote that public convenience and necessity require the improvement, it then orders the work. This ordinance cuts time and costs but still protects the property owners.

The rest of our presentation will concern suggested legislative changes in the 1911 Act.

With the exception of specific recommendations for amending Chapters 22 and 27 (Part 3 of Division 7 of the Streets and Highways Code) "Maintenance of Sidewalks" and "Construction of Sidewalks and Curbs" the discussions are presented solely to point up existing problems without including specific wording. If, after considering the approach of others who have testified, your Committee believes there is merit in the suggestions offered, our City Attorney will be pleased to help draft specific language.

Section 5102. This section allows the assessment of property acquisition costs up to a certain percentage of the construction cost. In general, the percentage is twenty per cent for a street opening, fifty per cent for street widening and for sewer easements. The history of this section shows a gradual increase in the allowable percentage. We use the section frequently and have had no serious problems administering it. It is now being suggested by some that the percentage limitation be eliminated entirely. We endorse the suggestion. Its effect would be to increase the number of 1911 Act projects that can be processed to completion. Under the present limitations, there are only three alternatives if the acquisition cost exceeds the allowable percentage. Either public funds are allocated for the excess, the project can be combined with a street opening proceeding under the 1903 Act, or the job may be abandoned. The usual outcome is that the job is abandoned, because, after all, most of the improvements are of purely local benefit and the other alternatives can be costly. There just isn't enough money in the budget to provide city funds for this. Thus we may have a job on which we have spent a lot of time preparing plans and specifications. Along this line, we note that the 1913 Act has no such percentage limitation on property acquisition costs.

ALLEN: May I interrupt you just a minute?

BRADLEY: Assemblyman Allen has a question.

ALLEN: In proceedings where, for example, rights-of-way must be acquired and then an improvement constructed, there is I believe a percentage limitation on the amount of money which can be spent for such an acquisition. The limitation is usually expressed as a percentage in addition to the construction costs. Thus, an improvement project would have to be dropped if, for example, the acquisition cost exceeded the construction estimate by more than say 50 per cent. Haven't you had to abandoned a good number of relatively small projects for this reason?

TILLMAN: Yes, a significant number. I can't give you the exact percentage. Even one or two is a significant number, however, when you consider the manpower that goes into an individual project. It's a waste of time if we have to drop a job. Then too, the people usually want the improvement; they are not interested in a 50 per cent limitation or a 20 per cent limitation. They want a street paved.

BRADLEY: Are these cases in which you exceeded the limitation by a matter of only 5 or 10 per cent, or did you exceed the limitation by a large amount?

TILLMAN: That would vary. Each case is different. There are many small jobs that are done under assessment procedures; the right-of-way costs involve a much higher percentage in these projects. You may have only two or three owners involved and if one of them holds out on his price for the right-of-way...

BRADLEY: After these hearings would you be able to check some of your recent records and give us a few examples of where you ran over and by what percentage? I think the Committee is interested in knowing whether we are opening the door to a very substantial problem if we relax the limitation. We don't intend to create a problem in order to cure a problem.

TILLMAN: That's true, but in lifting the lid off the percentage we're only asking for flexibility to help jobs move ahead. We still have the other controls if property owners wish to protest. But we'll give you some good examples.

BRADLEY: That's the point; we'd like to know what the percentage was that caused the project to be abandoned. All right, Mr. Tillman, you may proceed.

TILLMAN: Acquisition of rights-of-way. There is a further problem that has arisen because of the inclusion of the right to acquire property in the 1911 Act (Section 5102 added in 1955 with subsequent amendments). Many streets are widened under present procedures and it is of course necessary to acquire the right of way either by voluntary dedication, purchase or condemnation. In many instances, property owners in the assessment district have voluntarily dedicated portions of their lots prior to the inception of the application of the Act and in other situations they have dedicated voluntarily after they have been informed by the City that the right-of-way is to be obtained through condemnation. It seems only equitable that those who have voluntarily dedicated should receive credit against their assessment for right-of-way costs. This is especially true when there are those owning parcels abutting the street to be widened who have refused to dedicate voluntarily and force condemnation, who receive the same benefit, and yet are paid for the right-of-way. Presently the cost of such acquisition is assessed against all parcels benefiting regardless of whether or not there was voluntary dedication.

The Act possibly may be amended to provide that in those instances where there has been voluntary dedication of land for public street or alley right-of-way, either before or after initiation of Improvement Act proceedings, that in estimating the amount of benefit to be assessed against the parcels over which a right-of-way has been voluntarily dedicated, an allowance be made for the estimated value of such benefit by reason of the dedication of the land in the acquired right-of-way. In other words, give people credit for voluntary dedication.

Along this same line there is the additional problem where the City pays the cost of improving a major street which must be widened and obtains voluntary dedication with exception of certain "hold-outs". The City's payment is by contribution, but as the Act now reads and is interpreted by the City Attorney, before the assessment is levied contributions must be deducted from the whole cost of that portion of the work to which contribution is made. The result again is that those who have voluntarily dedicated are penalized. It is suggested that consideration be given to amending the Act to provide that the City may contribute funds which will reduce the assessment against the parcels over which a right-of-way has been voluntarily dedicated, but reserve the right to refuse contributions toward the "hold-outs". I think such a provision would assure us more cooperation.

Sections 5230-5235. These sections provide for changes in the work, boundary, etc. Incidentally, before I get into this, I might explain that, although the Act provides that the City Council can adopt a preliminary and final resolution, the City of Los Angeles has always used the ordinance procedure on the theory that, this being a legislative rather than administrative matter, the City Charter requires it. After adoption of an Ordinance of Intention, all such changes must be made through "modification proceedings" requiring adoption of a resolution and a public hearing. This is patently impractical in the case of minor changes necessary during construction, i.e. change orders. Yet there is no exception under the law. The result, of course, is that minor change orders are written and issued frequently without going through modification proceedings, so long as they conform to the general scope and intent of the project as originally approved by the petitioners. It is frequently suggested that the law be modified to recognize change orders. Although we haven't tried, it may be possible to draft legislation that will do this without violating due-process requirements. However, in general, we feel that the caution with which change orders are approached under the present law is healthy. It is a built-in protection for those within the assessment district.

BRADLEY: Mr. Lanterman.

LANTERMAN: May I ask what limitations you would devise to distinguish between a minor change order and a change which constitutes an invasion of the intent of the original landowner?

TILLMAN: We have no answer to that, Mr. Lanterman, except perhaps the dollar limitation. As it's done now, it's up to the judgment of our City Attorney and our City Engineer's office. What we want to do, in short, is to legalize what we're doing, but still to have these controls. We want the project to move, but we want to do it with controls.

LANTERMAN: A "dollar value" standard would have a flexible application through the years, which might not be in accordance with the original intent. Perhaps a fixed percentage per foot or something of that nature would be a better standard. Under such a standard, even though a change would be minor and technical, you would still have to measure it against a fixed limitation. Without some such standard a loophole exists which might be exploited by some public agencies.

TILLMAN: The problem of legislating on this matter is that you want the flexibility and yet you must have the control. That is exactly the problem before us, except that we have our own controls. We have the flexibility and thus we can put our own controls into effect. You may not find that attitude or atmosphere elsewhere.

BRADLEY: Please proceed, Mr. Tillman.

TILLMAN: Section 5101 (j). Pursuant to a 1961 amendment, this section now provides that bomb and fallout shelters can be constructed or maintained under the 1911 Act. Public reaction to international events last year precipitated a flurry of petitions for such shelters. None of the petitions have yet been granted. The matter has, however, been thoroughly studied. We were then and are now of the opinion that, aside from the question of whether public shelters as such are desirable, the 1911 Act as it is now conceived is not designed for this type of construction. There would be serious legal, administrative, financial and practical problems. We feel that, at least here in Los Angeles, an assessment act proceeding for a shelter would be immediately attacked on its constitutionality alone. There is also profound doubt as to the saleability of the bonds in this area. Perpetual maintenance is another problem. We feel that here in Los Angeles an assessment act proceeding for a shelter would be immediately attacked on its constitutionality alone. There is also profound doubt as to the saleability of the bonds in this area.

On a more general plane, we feel that there is not the same kind of public acceptance of shelters in the way there is for sewers, storm drains, sidewalks and other conventional improvements. Public attitudes follow the vicissitude of national and international events. Before we embark on such a program of shelter construction, we feel there first should be direction at the national level to the extent that there is nationwide public acceptance of the necessity for such public shelter construction. Second, we feel that entirely new legislation may be necessary. We're cognizant of the fact that a shelter was built under the 1913 Act, with 1911 Act bonds in Los Altos a few months ago. However, the circumstances there were recognizably unique. There was undoubtedly 100 per cent community acceptance. And there was no legal attack on the proceedings. It may be that this was simply a fortuitous outcome. We think that under other circumstances there would be grounds for such an attack, and that the 1913 Act is little different than the

1911 Act with regard to the general feasibility of shelter construction and maintenance. Los Angeles may perhaps be more cautious than a smaller community. But this is necessary. What we do for one block we must be prepared to do for ten thousand blocks.

We have dwelled on this matter for some length because it was undoubtedly the opinion of the 1961 Legislature that the people should be given the opportunity to aid themselves in shelter construction through the application of the 1911 Act as amended. If such was the intent, the present wording seems to leave much to be desired and so many serious problems unsolved that it is recommended this entire phase should be carefully reviewed.

Work on Private Property. This next item is one which we introduce with some reservation. Frankly, we debated long and seriously about whether it should be presented to this Committee and what our approach would be to the problem. We decided, however, to introduce it on the premise that your Committee is here not only to consider proposed specific legislative changes but to listen to problems for which we may not have specific answers at this time... but others may.

Briefly, the problem is this. We all know that the 1911 Act is for work on public property and all work must be public. However, we frequently encounter the necessity to do work on contiguous property which is not public. To be specific and cite an example, we may find it necessary to grade and pave a City street at an elevation higher or lower than adjacent private driveways. This means that in some manner the driveway will have to be adjusted to meet the new street grade. This is work on private property. Even so, we are frequently asked by property owners and others why we can't allow our contractor to remodel that driveway on private property, at the same time he is doing the street work. This seems like a very logical and natural request. Why should a property owner be compelled to find some other contractor to do the work when there is a contractor right there? And why should the property owner be compelled to make his own arrangements with that contractor when the City already has a going contract with him? Why indeed?

We might answer that certainly it would be right and proper for the City's contractor to do this work. After all, the driveway wouldn't have to be remodeled if the City weren't doing something to the street. Public relations certainly would be enhanced. It is easy to understand the indignation of a citizen whose driveway is left 3 or 4 feet above the new street that he's being assessed to pay for. From the contractor's standpoint, we suppose that he would have no objections so long as he gets paid for doing the work. From the Engineer's standpoint, he is spared the criticism often leveled at him that he didn't design the street properly when he left the driveways high and dry.

Now one may ask, why don't we do this work on private property. Seemingly we could obtain some kind of right-of-entry or easement which would allow the City or its contractor to enter private property to do the work. This is a question that frequently arises. We think it is not unique to Los Angeles; many communities must face this problem. Our answer is most frequently the simple statement that we cannot do work on private property. But the matter goes deeper than that. We may have acquired a street easement and have paid the property owner monetary damages for change of grade. It may be that the property owner has waived his right to change-of-grade damages. A complete title search would seem to be necessary before any right-of-entry or easement is obtained over the private property. The property owner may insist on bizarre standards of construction. Or it may be necessary to do more than just simply remodel the driveway. In some cases the property owner could properly insist that the change in street grade necessitates a complete new driveway back to the garage, regrading of the garage pad, rebuilding the garage, resetting the house and rebuilding a concrete block wall along the rear of his property! This obviously would be an unusual situation. Actually the most frequent and troublesome problems arise over the necessity to do very minor remodeling on private property for a relatively short distance back from the street property line. We might say then that the problem is, at least in part, one of degree. We favor some legislation which would permit minor remodeling but we do not favor legislation permitting wholesale reconstruction on private property. In short, such work if allowed by some legislative change in the Act should be limited to work which is immediately contiguous to and required by the street improvement. This, if for no other reason, to avoid interminable differences of opinion between the City, the property owner and the contractor as to precisely how such work is to be constructed. Any such legislation should furthermore permit the cost of such work on private property to be assessed against that particular owner.

We believe that any such amendment to the 1911 Act to permit work on private property would have to be very carefully studied and would have to be drafted with particular care to avoid an attack on its constitutionality. It should recognize the possibility that others in the district may protest on the ground that at least some of the cost of doing work on his neighbor's property has been assessed to him, the protestant. There is also perhaps the question of added municipal liability for damages or injury sustained because of the work on private property. The inclusion of such work can also be challenged on the theory that it is not public in the sense that upon completion of the work it is open to the public and useable by it. In the case of a driveway this is inherently private rather than public.

In view of what we have said, we are in the position of recommending legislation without knowing precisely how or whether it can be done. We do believe remedial legislation is desirable and hope that as a result of the hearings before your Committee there may be obtained some reaction that will be valuable in drafting legislation to meet that need.

BRADLEY: Mr. Lanterman has a question.

LANTERMAN: Mr. Tillman, when a City Council adopts plans and specifications for street improvements, the Department of Public Works and the City Engineer can tell them that there is going to be severance damage to "X" number of properties along the street. Does a City Council in fact have all of this information so that they know there is going to be these types of costs involved as a part of the total improvement? Is this knowledge available to the Legislative Body?

TILLMAN: In our city, yes. The City Engineer calls attention to these problems in his preparation of reports on the formation of the assessment district, and in the public hearing. When the plans are prepared they are open to examination by any of the property owners. Whenever we have this problem the property owners know it is coming. Usually it is a problem brought on by the developer or the property owner himself. They have built on a pad that has been graded before the street was fully widened or improved. Perhaps there was no established grade, or perhaps it wasn't widened to full width. They were allowed to put in driveways on a revokable basis, or perhaps some of them did it illegally without permits. The driveways, however, are there, and the homes are there. Somebody did not tie that construction in with the ultimate improvement of the street. That's where the real damage was done - way back when the house was built and these circumstances were brought to light, and it was pointed out that the property owner would have to bear the expenses.

LANTERMAN: It would seem to me that the severance damage is the result of the improvement regardless of the previous conditions. Thus, it would seem to me that some reasonable and practical means should be available for the municipality to cooperate with the property owner to solve the property owner's dilemma so that it does not become an impossible situation for him to cope with. Let the city buy the improvement, if doing it otherwise will cause impossible situations.

BRADLEY: I think that Mr. Tillman has suggested in his statement that there may be more problems in this than just engineering problems. You might even raise the question of the constitutionality of such a purchase. I would suggest to the Committee that there may be other witnesses who might like to comment on the legal aspects of this situation.

TILLMAN: As mentioned at the inception of this presentation consideration should be given to amending Chapters 22 and 27, which, although included in the 1911 Act, are actually eliminated from its provisions. The City uses these Chapters extensively.

Chapter 22 - Maintenance of Sidewalks. This Chapter provides that a property owner is responsible for maintaining his sidewalk in a safe condition for public use. It further provides that the owner may be cited to make repairs. If not made, the City can do the work and assess the costs. However, the owner often requests additional work which for one reason or another has not been called for in the citation. It has been suggested that where this is the case it should be possible to include the additional repair work without having to start a new proceeding. A new proceeding is not only time consuming but costly. The present provisions, however, of Section 5601 prohibiting new improvements should be retained. The problem is one of making additional repairs to existing improvements where minor defects exist that have not been included in the notice but which the property owner, for aesthetic reasons or to avoid future maintenance, wishes to have repaired. We therefore recommend that Section 5614 be amended by adding the following language:

> "Provided, however, owners of property liable to be assessed therefore may, by written agreement with the superintendent of streets, include other and additional repair work to be done but only upon sidewalks as defined by Sec. 5600, in which event the work to be done shall include that specified in the notice as modified or enlarged by the written agreement, and the cost thereof shall be a lien on the property to the same effect as if the work done were pursuant to the notice only."

And that Section 5615 be amended to read:

> "If the repair is not commenced and prosecuted to completion with due dilligence, as required by the notice, the superintendent of streets shall forthwith repair the sidewalk including any additional repair work as provided for in Section 5614."

Chapter 27 - Construction of Sidewalks and Curbs. This is the Chapter that permits the completion of improvements in a block when at least half of the block is already improved. The history of this Chapter has been one of gradual expansion. It started out applying only to sidewalks. Curbs were later added, then paving and more recently, sewers and storm drains. We use this Chapter frequently in Los Angeles. We regard it as one of the most helpful of the recent amendments to the Code. However, it applies only to streets. Alleys are excluded. Or rather, alleys are simply not mentioned. Occasionally, however, a situation arises where we wish we could complete the improvements in an alley under Chapter 27 rather than through the more formal, lengthy and costly proceeding for a conventional 1911 Act job. Along this line we suggest that Section 5870 be amended to read as follows:

> "As used in this chapter 'block' means property facing one side of any street between the next intersecting streets or between the terminus of a dedicated right-of-way of a street and an intersecting street, except that 'block' in the case of an alley means property facing both sides of any alley between the next intersecting streets or alleys, or between the terminus of an alley and an intersecting street, and 'driveway' means a paved portion of a public street providing an unobstructed passage from the roadway to an off-street area used for driving, servicing, parking, or otherwise accommodating motor vehicles."

And that the last paragraph of Section 5871 be amended to read:

> "As used in this chapter, 'sidewalks or curbs' includes 'gutters', 'pavement' to the centerline of the street, 'full pavement' in alleys, 'storm and sanitary drainage facilities', and 'superintendent

> of streets' includes any other person or persons who may be designated by the legislative body to perform any of the duties of the superintendent of streets set forth in this chapter."

And that the following paragraph be added to Section 5871:

> "Fronting" and "facing" as used in this chapter means "backing" in the case of property adjoining an alley improvement.

This concludes our testimony here this morning, unless there are any questions the Committee may have.

BRADLEY: Of course, when you define "fronting and facing" to mean "backing", you're taking considerable privileges with the meaning of the English language, but maybe this is the only way you can work it.

TILLMAN: Well, alleys make a double frontage problem. We do assess the rear of property, you see.

BRADLEY: I understand your problem, but when you say that "facing" and "fronting" mean "backing" you also have a problem.

TILLMAN: The engineers know what they mean, but the attorneys...

BRADLEY: Perhaps there'll be some experts here who will have a suggestion on that. Mr. Britschgi, do you have a question?

BRITSCHGI: Mr. Tillman, on your construction of sidewalks and curbs under Chapter 27 do you do the work pursuant to ordinance?

TILLMAN: Under Chapter 27 the Council must approve the work, but there is no ordinance required. There is just a notice to the property owner that he must do the work within a certain period of time or else the city will do it for him and he will be assessed for the cost. He can appear before the Council and protest if he wishes. He can also ask for permission to have a time extension if he thinks he might do it under a permit or if he thinks there is a forthcoming city improvement project, which might include his job. Usually we have investigated all those alternatives.

BRITSCHGI: You allow them to do their own work?

TILLMAN: They can have their own contract. But normally, however, they will let the city maintenance forces go ahead with the job because there is the personal inconvenience of getting an engineer to draw up the plans and getting the permit and so on. Obviously, letting the city do the work is fast. It is the fastest way to achieve improvements, other than a subdivision that has already been approved.

BRITSCHGI: Do you have any regular schedule for installing, repairing, or replacing such sidewalks.

TILLMAN: Yes, there is a regular schedule. There are a number of inspectors in the field all the time watching for tree roots which have broken a walk, or places where a truck has gone over a sidewalk and damaged it. There are also complaints that come in directly from the public.

BRITSCHGI: Do you require the planting of trees in your parking strips?

TILLMAN: We do in subdivisions; subdivisions must also include street trees. This is not compulsory in the case of assessment projects, although it may be done on the initiative of the property owners. Our engineers have been instructed to try to encourage this as part of the city beautiful program.

BRITSCHGI: How do you answer the problem of requiring a property owner to plant a tree which uproots the sidewalk, the repair of which the property owner must then pay for?

BRADLEY: Now, Mr. Britschgi, you're...

BRITSCHGI: I just wondered how he would answer that.

LANTERMAN: That's the root of the problem.

BRADLEY: (chuckling) Mr. Tillman, I would advise you as an attorney that you better not answer that question. Seriously, however, I would imagine that you would follow somewhat the usual procedure. You probably send out somebody who goes around looking at the sidewalks and when he sees a piece of sidewalk moving upwardly, he marks it with some sort of a colored crayon. The city then notifies the property owner to get someone to take out the root and fix the sidewalk. I presume this is the general practice.

TILLMAN: That is true. I don't think there is anything new about that, Mr. Britschgi. I think this is standard procedure.

ALLEN: Mr. Tillman, have you ever given any thought to making any provision for the speeding up of abandonment procedures? We have literally miles of alleys in this city that have no use as far as egresses to garages. Most people enter their garages from the front part of the lot, and the only thing that the alley does is to create quite a nuisance value - a place to dump debris, to commit various other nuisances, and to give good access to burglars.

BRADLEY: May I interrupt you, Mr. Allen? Is this a part of the 1911 Act?

ALLEN: Well, they still proceed under the 1911 Act as far as paving. Many people are using this 1911 Act in order to pave an alley that there is no possible use for. In other words, they are using the act as an excuse to clean up the debris. Then the city will maintain the paved alley after it has gone into the city system. A lot of paving requests under the 1911 Act, however, could be abandoned. The people could be told to apply for the abandonment of the alley and could set their fences back and take advantage of the extra yard space.

TILLMAN: Yes sir, but I believe that discussion would fall more under the category of abandonment proceedings.

ALLEN: Well, that's right.

TILLMAN: Bear in mind that we don't initiate the 1911 Act proceedings unless there is really a public necessity and convenience involved. Our Public Works Department, on the other hand, does have to maintain these other crude unimproved alleys.

BRADLEY: Mr. Britschgi has another question.

BRITSCHGI: Let's assume that a property owner doesn't have the money available to fix his sidewalk. How do you handle that situation? Is he given a straight billing, or is it on his tax bill?

TILLMAN: Is this a broken sidewalk?

BRITSCHGI: Let's assume it is.

TILLMAN: If it's just a broken sidewalk, we ask him to fix it within a certain period of time. The street maintenance forces will go out and do it for him if he hasn't. Usually, a property owner lets us do the job because it's such a small amount of work it doesn't pay to have a contractor do it. Later they are billed for this work; I think the bill comes at the end of the year.

BRADLEY: Thank you very much, Mr. Tillman. For the record, may we have the name once again of the gentleman with you?

C. E. ROBINSON: C. E. Robinson.

BRADLEY: C. E. Robinson. C. E. Robinson. And your position with the city is...

ROBINSON: Senior Civil Engineer with the Bureau of Engineering.

BRADLEY: Thank you very much for your presentation, Mr. Tillman. Ladies and gentlemen, we are now going to recess for the noon period and I'm going to ask the Committee to be back here at 1:15 p.m. We have a very extensive agenda and must get an early start to get through it.

## AFTERNOON SESSION

BRADLEY: The Committee will come to order. We will proceed with our next witness. Is Mr. Harold E. Rogers present?

HAROLD E. ROGERS, Nicols and Rogers, Attorneys at Law: I would like to apologize for not having been able to make a complete set of written statements, but I do have a statement containing the recommendation that our office is making in connection with the 1911 Act and the 1913 Act and the 1915 Act. I'd like to begin by identifying myself. My name is Harold Rogers, a partner in the law firm of Nicols and Rogers in San Francisco. By way of background, we have represented both counties and special bond counsel, and in addition a great many bond holders in their suits to foreclose various 1911 Act bonds. I would like to state at the outset that it is our firm conviction that these assessment acts - The Municipal Improvement Act of 1913 and the Improvement Act of 1911 - have served a very real and necessary purpose in the development of California's counties and cities for quite a number of years. I was happy to hear that the Committee does not intend to make any wholesale revision in these acts. I think that if they had been strictly interpreted as they are now written that the few abuses which have been brought to the attention of the Committee would not have occurred.

Our recommendations are embodied in two exhibits. Exhibit B contains our specific recommendations of a general nature regarding the 1913 Act. There has been a great deal of discussion and previous testimony concerning the problem of piecemeal acquisition. We have had experiences in a number of tracts in the problems which can arise when piecemeal acquisition is used, and we have come to the conclusion that it would greatly strengthen the act if this type of acquisition were stopped by a clear amendment or clarification of the pertinent provision. Section 10102 of the Streets and Highways Code permits either the installation or the acquisition of improvements under the 1913 Act. There is another section, however, which apparently has authorized the piecemeal acquisition of improvements. The latter section of the provision that states that any time after the preliminary approval of the engineering report the city or county or public agency involved may either let the contract or take such steps as are necessary to acquire improvements that are already completed, or other property. The question is, "What did the Legislature mean by the term 'or other property' unless it is to designate something that is not already in existence"? I think that, therefore, the act in its present form is somewhat ambiguous as to whether piecemeal acquisition is legal or not. If this practice is to be stopped, these provisions should be clarified. I think that in certain instances in which a developer has not been as trustworthy as he might be, he could have taken liberties with the municipality in this regard. By having the work acquired as he completed it under this piecemeal acquisition theory, he would not be required to post a completion bond or a labor and material bond. If, during the course of the work, he became insolvent or bankrupt, the work would stop, and there would be no person to get the improvements completed. If there had been a requirement for a completion bond or a labor and materials bond this wouldn't have happened.

Municipalities, bond attorneys, and bond houses are confronted frequently by requests by subdividers who desire to do their own work. The subdivider contends that by utilizing this piecemeal acquisition theory he really saves on his costs. I believe that this is so in a great many instances. There was an instance just several weeks ago, in which our firm acted as bond counsel, in which the engineer had estimated that a certain street work would cost about $40,000. This work was put out to competitive public bid and two bids came in, one for about $88,000 and the other one for about $96,000. The engineer of work, however, was quite confident that the work could be done for substantially less than these two relatively high competitive bid figures. I do not think, therefore, that it necessarily follows that just because work is put out to competitive bid the lowest possible price is obtained. There are a great many unusual circumstances which come up. In this particular case there had been a prolonged strike, and bidders just were not interested in bidding on certain jobs at reasonable prices. Therefore, I think it would be appropriate to consider an amendment to the 1913 Act which would permit the subdivider to do his own work.

Perhaps this could be worked out in somewhat the manner that it is worked out in the Improvement Act of 1911. You will recall that the 1911 Act has a provision that permits the owners of three-fourths of the land to enter into a contract to do their own work by posting a bond with the municipality. The land owners will do the work at the lowest bid after there has been competitive bidding. In this way the municipality is assured that the work will in fact be completed because a completion bond is required. There would also be a labor and materials bond, so that the land would not be liened if the materials men were not paid. In many cases this procedure will assure a lower ultimate cost.

Another problem that certain municipalities have run into with the 1913 Act and perhaps with the 1911 Act is that the subdivider would like to bail himself out of land costs if he could. Frequently the figures which will be submitted by the engineer to the County Surveying Department or to the City Engineer will contain suggested figures for costs of rights-of-way. The 1913 Act permits the municipalities to pay for rights-of-way, but in a new subdivision I don't think that this is proper in every instance. I don't think, however, that there should be any amendments to this particular portion of the act, but I do think that municipalities should be cautioned to look over these figures very carefully. What sometimes happens in reality is that a subdivider will make a down payment on country property at country land prices. Then he files a final subdivision map of record. This has the effect of converting country property into city property. Then he figures out the square footage of the street areas and says, in effect, that he would like to build the municipality for the cost of the street areas at city land prices. If a subdivider is permitted to get his money back in this manner, he might pay a good share of the cost of the acquisition of the land. There should be careful scrutiny, therefore, of these figures but no change in the existing law.

There is another problem I think needs clarification. In a few cases attorneys have been asked in effect to build into the proceedings prepayments of interest and principal. This has the effect of strengthening the bond issue. One example of this was the Cameron Park Subdivision about which you heard some testimony in Sacramento. Such a subdivision may be a little more speculative and a little slower in developing. The provision of the 1913 Act, under which this is done, is Section 10427. The section states that if surplus moneys are realized they can be used either to maintain the improvement or can be applied pro rata on the assessment. Perhaps in the Cameron Park case this section was interpreted to mean that you could purposely build a little bit extra into the proceeding. This may be a good idea; it may in fact strengthen the bond issue so that the bond holder gets his first principal and interest payments and won't have to foreclose. On the other hand, it could have the effect of encouraging more speculative issues. If this is the effect, it would not be a good idea. We are not taking a position on the matter, but I think the Legislature should clarify its position in this regard, so that bond attorneys will know which is the proper interpretation of the act.

The Committee may recall the manner in which the 1913 procedure is set up. The engineer prepares a report on the project and a hearing is held on this engineer's report. Then property owners may object. The Code provides that notice is to be posted on the property, to be mailed to the property owner, and also to be published. In a great many 1913 Act proceedings there has been a single owner who petitioned the city or the county to put in the improvements. This owner knows precisely what is going on because he is asking that the work be done in a certain way. It's really an idle act to post his property because he is the only person who could object and he knows about it already. It's certainly an idle act to mail him a notice that there will be a hearing, because he knows about the hearing already. In such a situation many bond attorneys will provide in the petition that posting and mailing shall be waived. There is, however, no statutory authorization for this, although it seems the proper thing to do. It would make bond proceedings a little simpler if a provision for waiving the posting and mailing provisions required by the Majority Protest Act of 1913 could be waived, upon petition or by a certain percentage of the property owners. We would suggest that if 100 per cent of the property owners signed the petition that this posting and mailing notice could be waived. It might also be urged that it would be proper to dispense with the publication notice, because if only one person or one group of people own the property and are able to object, why should notice be published. We are not taking a firm position on this latter point of waiving publication, however, because publication may be legally necessary in order for the municipalities to acquire jurisdiction to do the work.

There is another provision in the 1913 Act, Section 10310, which states that any interested person may object to the proposed improvement. This has traditionally been interpreted by the courts in other statutes to mean that the only person who has the right to protest is the property owner. The question is, why did the Legislature use the term "interested person"? Does that mean that a lienholder can also object? Does that mean that a mortgagee could object? That he would have standing to object? I don't think that the municipalities who have used this act have ever allowed anybody other than property owners to object, but I think that this language should be clarified so that "interested person" would be defined to mean the property owner.

It has also been suggested to this Committee that some notice be given to trust deed holders, whose interest will be automatically subordinated because of bond proceedings. Perhaps this would be a good idea, but certainly it would not be a good idea to give the subordinate interests the right to object, or to stop, or to terminate the proceedings. There are too many good proceedings that would be unnecessarily frustrated if parties other than the owners were given the right to object. Perhaps these subordinate interests could file with the County Clerk a request for a notice of an impending assessment procedure - similar to the manner in which one files a request for notice of default with the County Recorder. If a trust deed holder is interested in protecting his interest, he could then be sent a notice of the assessment proceedings. He would have a right to air in views, but would not have the right to object and thereby to terminate the proceedings.

There is another problem that also comes up with protests. When a person appears at a proceeding and states that he is a property owner, how does the hearing body determine whether in fact he has the right to object? Under the 1911 Act the property owner is defined in three ways, viz., either as the record owner, or the fee owner, or the person claiming to have some interest in possession. A very difficult burden is imposed upon the Clerk to determine whether a person claiming to be an owner is in fact entitled to protest. Perhaps the 1913 Act should be clarified to provide, as does the 1911 Act, that the owner must sign an affadavit to the effect that he really is the owner, and present a certificate of search of title that he is in fact the owner, and then, and only then, would he be given the right to cast a dissenting vote.

There are also certain suggestions which we have regarding a change proceeding. Let's assume that 100 per cent of the property owners petition for certain changes. They all know about these proposed changes and want them. Section 10313 of the 1913 Act provides that the changes may be made after publication of the notice for ten days. It would seem much simpler, if a waiver can be signed by 100 per cent of the owners, that this publication be dispensed with, because it is really unnecessary. In addition, Section 10316 provides that changes can be made that gives no time limitation. A reasonable interpretation is that changes should be made only up to the time when all works are finally accepted by the municipality. As the law stands, however, changes theoretically could be made several years after acceptance of the project by the municipality. This section, therefore, should be clarified.

Another requirement that I think should be waived if 100 per cent of the owners know that bonds are going to be issued, is the requirement for recordation of the assessment. The Code requires this under Section 10404, but it is certainly an idle act if the owners know that there is going to be a bond issue for every assessment. The purpose of a notice of recordation, of course, is only to give property owners notice that they have thirty days in which to pay the assessment in cash.

Another thing that I think would be quite helpful in clarifying the 1913 Act would be to have a provision specifically incorporating the definition of incidentals, which appears in the 1911 Act. At present there is no such provision, but I think most bond attorneys accept the 1911 Act definitions. There is always some question, however, as to whether a certain incidental is, or is not, proper under the 1913 Act. Some bond attorneys, for example, include among the incidental costs, the cost of the premium of the subdivision bond, i.e., the cost of the surety bond, which is required to be put up by the subdivider at the time that he files his final subdivision map. Whether or not this practice is proper under the 1913 Act is something that should be clarified. It has also been suggested that the cost of the engineering work for the final map should be included as an incidental cost, because the final map invariably becomes the assessments diagram. This would seem to be a proper cost.

I have another suggestion regarding the time when the bonds should be issued. Section 10600.5 of the 1913 Act states that bonds may be issued at any time after they are dated, after the expiration of the initial cash payment. If you have 100 per cent of the property owners who are anxious to get the work done, and if they know that they are not going to pay in cash, this thirty-day cash payment period just poses an additional delay in getting the work started and getting the money in. In a few instances the bond attorneys have authorized the immediate issuing and dating of bonds after the recording of the assessments. Perhaps this procedure could be speeded up if there were some legislative authorization for the immediate issuance of bonds. There would be some problem in this respect, however, because of the provision for a thirty-day period after the confirming of the assessment during which objections may be made. Another code provision states that the issuance of bonds is deemed conclusive evidence of the regularity of all prior proceedings. If you issue bonds the day after confirming the assessment, however, this would seem to remove the possibility of anyone filing a lawsuit, alleging that the petitions were not proper. On the other hand we argue that if the property owners were the only persons who could constitutionally object anyway, and that they petitioned for the bonds to be issued immediately, there wouldn't be any problem. At any rate, the Committee should consider this point.

The only other suggestions I have are certain procedural changes regarding the 1911 Act. As I stated, we represent a good many bond holders in foreclosure proceedings, and thus run across the particular problems that I will mention more frequently than some other offices.

Section 6610 of the 1911 Act states that a bond holder may bring an action immediately after the end of a certain period of time. It states that this action may be brought at any time after four months next succeeding the fourth Monday of September, following the date of delinquency of principal or interest. It seems to be kind of hard to follow this definition to start with, but basically it means that if the property owner has neglected to pay a July interest payment, the bond holder can commence his action immediately, without any prior notice, about seven months after the missing payment. However, if it is a January principal or interest payment that has been missed, the bond holder has to wait thirteen months before he can start his action. There seems to be no real reason, however, why in the latter case he shouldn't be permitted to start his action seven months after the January delinquency as he can do in the case of the July delinquency. Therefore, I think that unless there is some other good reason for retaining the formula set forth in Section 6610 that that section should be amended to provide that in the case of either a January or a July delinquency the action may be filed seven months later.

Section 6611 gives an alternate manner in which the suit can be brought. It states that a demand can be served immediately after delinquency - the day after delinquency in the case of either a January or a July payment. This demand must be personally served on the owner of the property. Then thirty days thereafter a complaint can be filed. The question is, who is the owner? This is sometimes difficult to determine. The only sure way of finding out who the owner is, is to order a title report. But this may cost, and frequently does cost, in excess of $30 - sometimes as much as $40 or $50. If a bond holder is required to order a title report, however, and if the delinquency is paid up before a thirty-day period, he's out his $30 or $40. He can only recoup this cost if he files his action and the law permits him to recover reasonable attorney's fees and costs. Compare this remedy to the manner in which foreclosure can be brought by the Treasurer. The Treasurer is permitted to start foreclosure proceedings by sending a letter through the mail to the property owner at his address as it appears on the last tax roll. Admittedly, the property may have been sold since the time when the last tax roll was made up, but another section says that this circumstance does not make any difference. Six months thereafter the Treasurer can advertise and sell the property. It would seem to me that it would be just as logical to permit a bond holder to determine the address of the property owner on the last tax roll, to personally serve that person, and then within thirty days to start his action. In other words, if a procedure is good for the Treasurer, why shouldn't it be good for the bond holder? The bond holder does not have to serve a demand at all if he commences his actions seven months after delinquency. I think there's no logical distinction here and that such change should be made in order to make it a little easier for the bond holder.

It ought also to be noted that it frequently happens that if one bond goes into default, quite a number of other bonds of the same issue also go into default. I think that the law might specifically provide that all bond holders could join together in a single action in such a case. This would save time in court. Such a joining of action is permitted in the 1911 Act when a contractor attempts to collect his own assessments, and I think that it should be provided for in a case of bond holders.

In case of a Treasurer's sale of property, Section 6509 provides that the lot shall be sold to the purchaser who shall take the least amount of the lot and pay all the sums specified in the notice of sale. This raises a problem in a case in which one bidder would agree to pay all the amounts due, but another bidder would bid for only a portion of the property - ten or twenty feet less than the entire lot. In such a case you might find a situation in which a property owner is left with ten or twenty feet of his property which is absolutely useless. On the other hand, if the property is sold pursuant to a court foreclosure, the Sheriff will sell the property to the highest bidder. There would seem to be no logical reason why this section shouldn't also be amended to provide that the Treasurer should sell to the person who bids the highest amount for the entire property.

Also, I think that the Legislature might consider amending Section 6616, which sets a limit on the amount a bond holder can be reimbursed for the cost of the title report. A recent change in the law, you will recall, requires a bond holder to order a title report before he can know who the property owner is, for purposes of a foreclosure action. It is rather difficult, however, to get any title company to produce a title report for $30. Many of them want $40 or $50, and some even $75. Perhaps the statutory limit should be raised to at least $40.

Finally, there is a situation which is frequently found in which a bond holder has lost his bond or has had it stolen. What should be done in this case? The bond holder is obviously entitled to the payments of principal and interest twice a year, but the

Treasurer is not going to send him the money until he gets the coupons. Perhaps the law can be clarified here to permit the Treasurer to issue a new bond upon payment of a nominal fee. In such a case I think that the bond holder should also be required to post some sort of a surety bond in case the bond ultimately turns up in the hands of a bona fide purchaser, so that the Treasurer would not be in a position of having paid money to the wrong person.

The suggestions that we have made are ones which we feel would help to make the act more workable and to clarify some of the questionable and ambiguous parts of it. I want to thank the Committee for its attention.

BRADLEY: Thank you very much, Mr. Rogers. Are there any further questions from any members of the Committee? Mr. William McKenzie Brown, please.

WILLIAM MC KENZIE BROWN, Attorney at Law: My name is William McKenzie Brown. I am an attorney in Los Angeles and I have worked in the area of these Improvement Acts for approximately thirty years. I have functioned as the approving counsel for contractors, I have approved opinions on assessments, and I have been a special counsel for various cities to advise them on special assessment proceedings. I have reviewed the transcript of this Committee's June hearing and also the Attorney General's opinion regarding acquisition procedures under the 1913 statute. I am not going to make specific reference to technical changes, because I think Mr. Jack Rogers and Mr. Frank Hamilton covered that subject fairly thoroughly. I concur in their remarks.

It appears to me that the circumstance that brought this entire matter to a head is the rather loose interpretation of the word "acquisition" under the 1913 Act which allowed the practice of piecemeal acquisition. I don't think that it was ever the intent of the Legislature to allow the acquisition of something that was not in being. The 1913 Act, as originally enacted, provided for the acquisition of certain utilities which were in place. You knew what you were acquiring and there was no great problem. Some counsel, however, have jockeyed around with this statute and it has unquestionably resulted in certain abuses as have been set forth by the Attorney General. This whole situation could be very simply taken care of by a one paragraph amendment, which would limit acquisition to those improvements which are in place, or to the acquisition of necessary rights-of-way or easements for street purposes. No construction work should be considered as an acquisition. Construction work, moreover, should be undertaken pursuant to an orderly procedure requiring competitive bidding and performance and materialsmen's bonds, as set forth in the Improvement Act of 1911. In southern California we have had no trouble with the Improvement Act of 1911. We have had no problems because we go through the entire list of steps that act requires - we have public bidding, and we require the low bidder to file a performance bond and labor and materials bonds. In general, we fix the amount of the bond so that there is no possibility of a contractor going broke and leaving the city or the district in a situation where there are no improvements and there is no money to pay for them. Such an amendment would be very simple to make and I see no great difficulty in it.

As far as I am concerned, there are certain advantages to property owners in the use of the 1911 Act. I have particular reference to the opportunity provided to the property owner to be heard after the work is done. At this Committee's Sacramento hearing the Attorney General pointed out abuses which resulted in faultily constructed improvements. In these cases there was no provision for a hearing after the improvement had been completed. Under the 1911 Act proceedings, however, if a property owner does not think that a job has been done properly, he has an opportunity to protest at the conclusion of the project. This protest comes before any money is spent, before the property even has an assessment against his property. He has an opportunity to appear before the City Council or the Board of Supervisors and to obtain a full hearing on his complaint. Thus, the property owner can obtain a full hearing as to whether or not a job has been performed in accordance with the plans and specifications. I think that this is a very fine safeguard for property owners and that it should be maintained. This is one safeguard, moreover, which is not provided in the 1913 Act.

BRADLEY: Are you suggesting, Mr. Brown, that the 1913 Act should be amended to provide for such a hearing?

BROWN: I don't see any reason why it shouldn't be. The only difficulty is that under the 1913 Act the assessment has already been levied and the bonds have probably have already been sold. Thus, it may be rather futile for a property owner to protest and say that he thinks that his money has been misapplied. In any event the 1913 Act should be limited to apply only to improvements in place and those which must legitimately be acquired.

I have no quarrel with using either the 1911 or the 1913 Act for the benefit of subdividers. There may have been abuses as was pointed out by the Attorney General, but I don't think that there is any reason why these acts should be subject to abuse. In a sense this country has been developed on borrowed money. Obviously, the municipalities do not have sufficient money to put all the improvements in on a cash basis; they have to make some provision for assessing private property to pay for the improvements. I would advise against curtailing the use of these acts in subdivision situations because I think they can properly be used in such circumstances, provided that the safeguards of competitive bidding and surety bonds are required.

BRADLEY: Would you care to comment on the suggestion that if, after competitive bidding, the bids seem to be out of line, a developer might proceed to do his own construction.

BROWN: I would approve of that suggestion, Mr. Bradley, provided that you have all the safeguards which are required by the 1911 Act, i.e., a performance bond and labor and materialsmen's bonds.

I have one additional comment on the subject of modifying the work. Mr. Tillman, of the Los Angeles City Board of Public Works, raised this point this morning. Quite frequently, after the initial hearing on the resolution of intention, property owners will point out various additions or deletions that the engineer has not considered. These are usually minor and it seems rather ridiculous to require a new resolution of intention, a new publication of notice, and a new hearing on each of these minor changes. I would suggest that this procedure be made similar to that used for the assessments. A notice of hearing is not required on a modification of the assessment, and I don't think a notice of hearing on the modification of a resolution of intention should be required either. Such safeguards might well be retained in situations occurring after the letting of the contract. This would protect both the contractor and the property owner.

In conclusion I repeat that I concur in the remarks made by Mr. Hamilton and Mr. Rogers on certain technical changes that probably should be made in the act. I think the main trouble, however, has been with the broad interpretation of what constitutes an "acquisition".

BRADLEY: Thank you very much, Mr. Brown. Are there any questions by members of the Committee? Mr. Allen.

ALLEN: In regard to Mr. Tillman's testimony about change orders, is it your contention that because every action of the City Council of Los Angeles is by ordinance, there would still be a thirty-day period in which to appeal for modifications or to challenge the measure?

BROWN: Yes, that is a safeguard.

I would like to make one brief observation, on Mr. Tillman's comment about putting in improvements on private property. I think that if you are going to open the gate to putting improvements on private property, you should give this very careful consideration. I had an old law professor once, who said that the gates of fraud swing wide open, and it's hard to legislate against it. You have to be as careful as you can. I'm a little bit afraid that if the recommendation of the Board of Public Works for doing work on private property is accepted that it would have to be interpreted very strictly. I also question very seriously the constitutionality of such a provision.

BRADLEY: Thank you, very much, Mr. Brown. We appreciate your appearance. Mr. Nejedly, please.

JOHN A. NEJEDLY, District Attorney, Contra Costa County: Mr. Bradley and members of the Committee, I am here today at the suggestion of Mr. Bradley to present some specific suggestions for legislative changes. These were prepared in conjunction with a recent meeting of California Public Works Directors. Most of these suggestions, however, have already been mentioned, and therefore I will comment only in regard to two points that were not covered in previous testimony.

We would endorse almost completely the suggestions of Mr. Hamilton. I might mention some reservation, however, with reference to his suggestion of amending the Business and Professions Code, Section 1773. A bill of this type was introduced in the 1957 Session of the Legislature and was overwhelmingly defeated. Unless we can find some other way to express this change, we will probably meet the same reception again.

Legislation embodying Mr. Allen's suggestions regarding abandonments was submitted to the 1961 Session of the Legislature. It failed to pass simply because there was no agreement as to what would happen to property which was finally abandoned. We think we have reached an agreement, particularly with the utility companies, on this type of legislation and it will be resubmitted at the next session of the Legislature in a different form.

The only other comment I wish to make is in regard to a term which has been used repeatedly throughout these hearings. I realize that the Chairman has restated the objectivity of the Committee, but there is one word which still concerns me. This is the word "abuse". It would be well for the Committee to realize that for example in Los Angeles City alone, there are over 400 assessment proceedings a year. In our county we have roughly 100 such proceedings. I think that it is not an indictment of these proceedings, but rather a confirmation of there general regularity over the years that we can find so few alleged abuses. We must be cognizant of the fact that these so-called abuses will creep into any form of organization, no matter how scrupulously we try to eliminate them. I think that it is unfair to characterize these occurrences as abuses, at lease insofar as these demand some extraordinary means of correction. I think we all instinctively react to the word "abuse" as if something existed which was inherently vicious and wrong and which had to be corrected. This is not the case at all under the present circumstances.

BRADLEY: Mr. Nejedly, do your remarks apply to both the 1911 and the 1913 Acts?

NEJEDLY: Yes. I repeat what I have said before, Mr. Bradley, even after reviewing the transcript of your Committee's Sacramento hearing. I do not accept the term "abuses" at all. These so-called abuses have all arisen from lack of administrative control, or from factors that could have been properly taken care of if there had been administrative realization of the details involved in these assessment situations. I also think that it is extremely unfair, and not only because it refers to my own county, to designate as an abuse a situation in which an act of God, a landslide, destroys the improvements after they are completed, and thus eliminates the value of the improvements. It is hard for me to understand why this type of situation should be presented to the Committee as an abuse of assessment proceedings.

Similarly, I find it hard to believe that because a lienholder is not given notice of pending assessment proceedings, an abuse has occurred. Persons who lend substantial amounts of money under these circumstances are generally aware of the effects of potential assessment proceedings, particularly in the case of raw land. I think that we would all like to find some form to notify people who have an interest in the property. No one wishes to conduct assessment proceedings which affect equity rights in property without having property owners at least aware of the situation. To give notice to a lienholder, however, would result in a situation in which someone is notified who can have no voice whatsoever in the proceedings, because all protests necessarily have to come from the property owners. Thus, I think, we ought to be more objective and not try to search for things that don't exist. We ought not to characterize as abuses things which really relate to acts of God, or to situations that arise out of the relationship that has been created between a property owner and a person from whom he has borrowed money.

BRADLEY: Mr. Allen.

ALLEN: As I understand that landslide situation, the landslide followed after some excavation had occurred. Some of the vegetation had been stripped from the land and there had been a heavy rain.

NEJEDLY: The improvement, however, was completely in place. It had been acquired through assessment proceedings. At the time of the assessment proceedings, a soil study was conducted and a report was given on the stability of the property. The subsidence which occurred was unexpected. In terms of the administrative controls which were exercised, the landslide would have occurred regardless of what type of improvement proceedings had been used.

BRADLEY: May I interrupt for a minute. The facts surrounding this particular case are in the transcript of the Sacramento hearing. There is no need to review these facts again here. I agree that this case should not be used as a classic example of an "abuse".

NEJEDLY: The reason I brought up the situation again, Mr. Bradley, was that I thought the use of the word "abuse" was unfortunate. I believe we all react emotionally to this word "abuse". I merely wanted to point this out in an effort to help the Committee retain its objectivity.

Our final recommendation about the Improvement Act of 1911 is to suggest that the section to which Mr. Tillman referred, Chapter 27, be removed completely from the statute. We feel that these proceedings - improvement of curbs, gutters, sidewalks, and pavements in front of individual pieces of property - have no real relationship with the purposes of the statute. At the same time we would request that Chapter 27 be amended to provide for the completion of pavement projects within an intersection. Under the present language, an intersection is not covered in the definition of the area in which work can be done, and property owners assessed for its cost. We suggest that this change regarding intersections be included in the Improvement Act of 1911 and then that the whole of Section 27 be deleted from the act.

BRADLEY: I'm not quite clear - if you delete Section 27 from the act, what will follow from that action?

NEJEDLY: Well, it could be placed elsewhere in the Streets and Highways Code, or in some other code...

BRADLEY: Oh, I see. You would re-chapter it.

NEJEDLY: Yes. Put it in a new chapter altogether.

BRADLEY: You'd make up a new procedural act, is that it?

NEJEDLY: No, it would be the same language removed from the Improvement Act of 1911 and put in a different section or a different division of the code.

BRADLEY: Mr. Lanterman.

LANTERMAN: One purpose of the Committee's study is to clarify the 1911 Act, so that there won't be so many confusing and irrelevant sections in it. By following your suggestion, however, and removing Chapter 27 from the act and placing it in some other section of the code, wouldn't we cause the same kind of confusion as though the chapter had been deleted altogether?

NEJEDLY: I do not think so. In its present form, Chapter 27 is completely out of context; it has no identity with the Improvement Act of 1911. It refers only to the construction of curbs, gutters, sidewalks, and other ancillary improvements in a completely different type of proceedings from the 1911 Act proceeding. I think it would eliminate confusion to remove it from the 1911 Act because fundamentally it is not part of the 1911 Act.

LANTERMAN: I only wish that there was a way to make it plain that we had removed it not for purposes of hiding it, but simply because it had no relevance.

NEJEDLY: Finally, Mr. Bradley, we suggest an amendment to Section 5891 of the 1911 statute to clarify the form in which the notice of the improvement must be given to the property owner. We will provide the Committee with our suggested wording for this amendment.

This concludes my statement, except to endorse once again the comments of Mr. Hamilton, which are an excellent statement of the administrative changes we would approve of.

BRADLEY: Thank you, very much, Mr. Nejedly, for your continued interest on this particular subject. Mr. Roscoe Hess, please.

ROSCOE R. HESS, Attorney at Law: My name is Roscoe R. Hess. I am a lone-wolf attorney. I was once a bureaucratic attorney some thirty-five years ago. I examine assessment proceedings, but I do not conduct any. Of the 400 proceedings that Mr. Tillman mentioned had been conducted in the City of Los Angeles, I have examined 20 or 30 or possibly 40. In the time alloted me, I would like to summarize briefly some suggestions I have about the improvements.

First of all, if you have an assessment proceeding which involves property, which is located both in the city and in the county or in two cities, the assessment should be recorded in the office of the Superintendent of Streets of each governmental entity, so that a title company will be aware of such assessments. For example, take a situation which involves property in San Fernando and in the City of Los Angeles. A title company should be able to pick up any assessment on San Fernando property in the office of the Superintendent of Streets of San Fernando. It has already been suggested that a copy of the original assessment diagram ought to be filed in the office of the County Recorder so that savings and loan associations and other financial institutions will have notice of a prospective assessment.

You may regard this next suggestion as somewhat radical. The point has been raised of the somewhat high incidental expenses connected with some assessment proceedings. In some of its proceedings, incidental expenses for the County of Los Angeles ran over 30 per cent. The City of Los Angeles is limited by law to 12 per cent. I would suggest a limitation of 20 per cent on incidental expenses. If a contractor cannot get by with 20 per cent, perhaps the city itself should absorb the difference.

Next, I would suggest some type of registration of the names and addresses of owners of assessment bonds. This would make it easier in condemnation proceedings to trace those persons who have an interest in the condemned property. Otherwise, a bond holder remains uninformed except for casual information which he may obtain from the City Treasurer. There is some doubt as to whether the person entitled to a certificate of sale on the foreclosure of one bond, can pay off a superior bond until he actually has that certificate of sale. In cases in which there are inferior and superior bonds involved, I would recommend that the holder of the inferior bond have the same right as an ordinary lien holder under Section 2903 of the Civil Code. Thus, when a superior bond was being foreclosed, this would enable an inferior bond holder to pay off the superior bond. The existing section of the code, Section 6516, might limit his right to do this, unless he has in his possession a certificate of sale on his own foreclosed bond.

I also agree with Mr. Nejedly that the limitations on acquisitions under the 1911 Act should be extended to apply to the 1913 Act.

At this point I wish to express to the Committee my very violent opposition to the 1913 Act. I will elaborate upon this in detail.

First, let me say this. The 1911 Act has been used for fifty years. In all that time it has not lent itself to abuses. On the other hand we find that the 1913 Act has been subject to abuses within just a few short years following the amendment under which the present piecemeal acquisition policies have been justified. It seems to me that the 1913 Act was deliberately designed to be a source of private profit to subdividers, and to give very scant recognition of the rights of the general public. I will elaborate on this point further on.

Regarding the acquisition of nonexistent improvements under the 1913 Act, it is a matter of wonderment to me why bond houses and bond attorneys in the north part of the State never saw fit to obtain a decision by the Supreme Court as to whether this practice was within the law.

As for the matter of a reserve fund, it may be beneficial, but it reminds me of what happened after the 1929 crash. At that time some of the sellers of 1911 bonds paid up delinquent principal and interest installments, in order to say that these securities were seasoned bonds. A reserve fund seems to me to accomplish the same result. It makes the bonds look as if they were seasoned.

Mr. Brown has already mentioned that under the 1913 Act there is no opportunity for a hearing on the quality of the work after the project has been completed. Under the 1911 Act, however, a contractor will pay thorough attention to his work, because he knows that if there are protests at the end of his job, his assessment warrant and diagram may be held up a week or two. During this time his assessment will remain unconfirmed and he will lose money in interest payments. The 1913 Act, however, is based on guesswork, i.e. on estimates. If you are a bureaucrat, you are going to pad those estimates. Why? You want to be on the safe side. You don't know exactly what your acquisition costs may be; you don't know exactly what your construction costs may be. Thus, you pad your estimate. At the end of the job, of course, there is a refund and the property owner is usually tickled to death to get it. He is really being deceived, however, because the refund is not due to reasons of efficiency. It's due to the fact that the assessment is padded at the very beginning.

The proponents of the 1913 Act say that their method is cheaper because it involves a lower interest rate on the assessment bonds. This is not really true, because the 1913 Act levies the assessment in advance of the work. The property owner whose assessment is levied in advance, doesn't get the benefit of the improvement until it has been completed and is available to him. If the job takes eight months and if he pays cash at the beginning of the job, he is paying for the improvement eight months ahead of the time when he will be able to use it. At 5 per cent interest, this amounts to 3½ per cent. In this situation, therefore, the property owner pays 3½ per cent extra for the fact that he will not have the benefits of the job until a later date.

At this point I would like to say a few words about the philosophy of the subdivision situation. Mr. Wenig mentioned that the F.H.A. and other institutions existed to provide funds for subdivision development. He also brought up the question of just what the legislative policy should be in regard to the financing of subdivisions. It is the policy of the F.H.A., savings and loan associations, banks, and other financial institutions to provide loans for vacant land only when those loans are part of a program to build structures on the land. In cases in which a developer wants only to subdivide a section of land and to sell the resulting lots he is unable to obtain this type of financing. The argument is advanced that in this latter situation because the normal types of financing are unavailable, bond buyers under the 1911 or 1913 Acts should come to the rescue and finance the subdivision. Special assessments are supposedly based on benefit to the land, but after all, is it not people that we ultimate desire to benefit? What people are benefited when a subdivision is financed under the 1913 Act? Is anyone else benefited except the subdivider?

BRADLEY: Are you suggesting that we ought to abolish the 1913 Act altogether?

HESS: Mr. Chairman, if the limitations on the 1911 Act could be eliminated, if it could be used to accomplish the same kind of acquisition - and I don't mean non-existent improvements -

which are now possible under the 1913 Act, then I don't think there is much reason to continue the 1913 Act. I see nothing wrong, Mr. Chairman, with calling the 1911 Act an acquisition and improvement act. Thus you would have one bond instead of two. For example, you would have one 1911 Act bond instead of a 1903 street opening bond and a 1911 improvement bond.

I also believe that it might be wise to limit the size of assessment districts in situations involving vacant land. Suppose there was a five-acre limitation, such as is contained in the Subdivision Map Act. There could be a five-acre limitation which would apply, unless there was a demand from property owners in a highly settled area which included more than five acres.

BRADLEY: Mr. Hess, I think you are getting a little bit afield here. Your suggestions really go a bit beyond the scope of the Committee's immediate objective. I would suggest that you might wish to submit to the Committee a brief resume of your suggestions on these other matters. I think, however, that in the interest of the other witnesses who are waiting their turn, that I must limit. presentations to the stated objectives of today's hearing.

HESS: I will submit that statement, Mr. Chairman.

BRADLEY: We appreciate your presentation, Mr. Hess. I have made a notation that you appear to be generally opposed to the 1913 Act. Mr. Anthony Kennedy, please.

ANTHONY KENNEDY, Attorney at Law: Mr. Chairman and members of the Committee, my name is Anthony Kennedy. I am an attorney at law, with offices in the Forum Building in Sacramento. I am appearing here today as the legal advisor to the California Council of Civil Engineers and Land Surveyors.

The California Council of Civil Engineers and Land Surveyors has been quite interested in the Committee's studies of the Improvement Acts. The transcript of the Committee's June hearing in Sacramento has been studied by a special committee, chaired by Mr. Enoch Stewart, who is sitting at my right. Mr. Stewart will state the recommendations of the Council to the Committee. In introducing Mr. Stewart, I would like to mention that he has had staff experience with the County Engineers of Sacramento, and is now the senior partner in the Spink Engineering Company of Sacramento. This company has done extensive work in the Sacramento Valley under both the 1911 Act and the 1913 Act proceedings.

ENOCH STEWART: The California Council of Civil Engineers and Land Surveyors represents 287 firms of engineers and surveyors in private practice in this state. A major portion of the work done by these firms involves the development of raw land for residential, commercial, and industrial uses. In such capacity, these firms perform the engineering services which are required for the subdivision of land and the construction of public improvements.

BRADLEY: Instead of going directly into your presentation, as I assume that you are now doing, would you explain briefly to the Committee what you consider to be the issues which involve the Council of Civil Engineers and Land Surveyors.

STEWART: As Mr. Kennedy has pointed out, our member firms do the engineering and surveying work for the development of land. Frequently, therefore, our work is done under the provisions of the 1911 and 1913 Acts. Our study committee considered what effects the changes which were suggested in the Attorney General's recommendations to the Committee in Sacramento might have on proceedings of this type.

BRADLEY: Your statement, then, is directed towards both the Attorney General's opinion and the suggestions in his report.

STEWART: That's right.

BRADLEY: The statement then is primarily directed to the 1913 Act?

STEWART: Primarily, yes.

As a result of this Committee's initial hearings in June in Sacramento, the California Council appointed a special committee made up of engineers from various parts of the state, to survey its entire membership and make the position of the engineer in these Improvement Act proceedings known to your Committee. The following comments are a concensus of the survey, and of the deliberations of the special committee. We believe that they reflect the opinion of most of the engineers engaged in projects which use Improvement Act financing for the development of subdivisions.

1. We believe that the use of Improvement Act financing for the construction of public improvements, as an aid in the development of property, is an important and needed tool. Any legislation which would tend to restrict the use of this type of financing will be detrimental to the home building and construction industries, two important segments of the state's economy.

2. The so-called "abuses", as set forth in the Attorney General's report, represent an extremely small portion of the total development program which is using Improvement Act financing. As

such, they should not be cited to encourage legislation which would be detrimental to an otherwise workable procedure.

3. In our opinion, most of these "abuses" could have been avoided if the local administration or the local legislative body had been properly informed. Realizing that the Improvement Act procedures are a specialized field of law and are not easily or quickly absorbed, our Committee has proposed an educational program in the form of a "supplementary guide" on the use of the Improvement Act. Such a guide will be developed in cooperation with the major bond attorneys and bond dealers of the state, and will be distributed to proper local officials and engineers engaged in the use of the Improvement Acts. (As so ably stated by Mr. Nejedly, we feel that the primary problem in this area is one of making the local people aware of the implications of the Improvement Acts, so that they can protect the local agencies in the use of these acts.)

4. It is proposed that this guide will include recommendations on how engineering fees should be determined in each locality and on what portion of the total engineering services, which are provided for a subdivision, should be included in an Improvement Act proceeding. In this regard, it should be noted that subdivision and map fees were first considered as a part of an improvement proceeding when the bond attorneys began to consider lot grading as a part of the allowable work.

5. The following are a number of items which, in addition to the engineering design fee, are frequently included in a list of incidental expenses under the heading of "engineering": a. field surveys in soils engineering, as required for design; b. construc-

tion staking and supervision; c. fees for plan checking and inspection paid to various public agencies, which will maintain the proposed improvements; d. services provided by the engineer in connection with the proceedings and assessment; e. services provided by the engineer in connection with the acquisition of properties and rights-of-way. As an example under section d. the engineer is called upon to perform a number of functions under either the 1911 Act or the 1913 Act procedure, which are in addition to his normal engineering services. These include the preparation of maps and diagrams for the district, description of work, posting of improvement notices, public hearings on various portions of the proceedings, preparation of descriptions for the assessment, calculation of the assessment, etc. The cost of this additional work is frequently included with the "engineering" fees, causing them to appear excessive. Other variations in engineering fees will result primarily from the amount of field work required for design notes and construction staking, and the performance of inspection. These items are frequently done on a per diem basis, because they vary in scope from job to job.

In short, we feel that the "engineering" fee, listed as part of the incidental expenses in a proceeding, has reason to vary, and it should be examined by a person with this understanding before it is declared to be excessive.

6. Our committee would also like to comment about its finding on the Attorney General's statement concerning "padding" of the incidental expenses in connection with the County Club Park Assessment District in Yuba County. We checked with the engineering firm involved, and were told that the portion of the incidental

expenses which were received by the developer of this subdivision was a refund of prepaid engineering expenses which were rightfully chargeable to the assessment.

7. Our comments thus far have been directed toward incidental expenses and fees. However, we have worked and will continue to work with bond attorneys and bond dealers on items which the Attorney General has recommended for legislative action.

Although these proposed changes are in the legal field, we are anxious that they will not curtail the use of the Improvement Acts for financing public improvements in subdivision development.

We wish to thank the Chairman and the members of the Committee for the opportunity of being heard on the matter of municipal improvement acts and to offer to the Committee the consultation and the advice of the California Council of Civil Engineers and Land Surveyors whenever it is sought.

BRADLEY: Thank you, Mr. Stewart. Are there any questions from members of the Committee? Mr. Kennedy, do you wish to add anything to Mr. Stewart's comments?

KENNEDY: No, not at the present.

BRADLEY: Thank you both very much for your presentation. Mr. Kenneth Jones, please.

KENNETH I. JONES, Attorney at Law: Mr. Chairman and members of the Committee. My name is Kenneth I. Jones. I am with the law firm of Wilson, Harzfeld, Jones & Morton in San Mateo. My purpose in appearing here today is two-fold: to supplement the record of the Sacramento hearing and to report regarding developments in one improvement project which have occurred since that hearing.

The project to which I have reference was characterized as an abuse at the Sacramento hearings. We have acted as bond counsel for that project. I would like to describe to the Committee very briefly what has happened in that project. I have prepared a somewhat more detailed statement on this matter, which I do not want to release today because I want to double check the figures which are contained in it.

The Committee will recall that this project involved the filling of low marsh areas in the City of Larkspur in Marin County. It also involved the construction of a road and utility improvements on the completed fill section. The estimated cost of the fill work portion of the project was $195,000. That portion of the project has finally been completed to the satisfaction of the City Council. The final cost - and this is the figure I would like to check in somewhat more detail - was $261,326.64. I want to make it clear that this figure includes $26,417.94, which was represented to you by the Attorney General's office as the amount which was paid to the owners and allegedly improperly converted to their own purposes. The basis on which this latter payment of some $26,000 was made to the owners was substantially that which has been described by the Attorney General. The dirt which was used to fill the marsh was taken from other property which the owners possessed. They took dirt from one location, which needed cutting down, and deposited that dirt in the marsh area. The payment was a payment for the dirt - a charge which would have been included in the improvement project had the matter gone to public bidding through the city.

The additional costs of the project involved the completion of a road and of utility improvements on the completed fill. The estimated cost of that work had been $93,125. The actual cost was $101,812.99. This figure represents the combined total of a firm contract for the completion of the work, plus a firm figure for the cost of the materials which will have to be used. Thus I can represent it as a reliable figure. The cost of the civil engineering was a fixed sum, $23,050. That figure remains unchanged. Other engineering costs were estimated at $6,500 and their actual costs came to $6,336.75. Our fees as bond counsel were two per cent of the total project, or $7,806, which figure is the same as was estimated.

The bond discount was very high - 15 per cent of the total bond issue, or $58,545. The figure for city inspection, cost of servicing the bonds to the City Treasurer, printing and advertising is still an estimate, because some of the costs have not been liquidated. The estimated figure of $6,274, however, is reasonably close.

This means that the total estimated cost of the project was $390,300; the actual cost has amounted to approximately $466,151.38. This leaves a contribution of $75,851.38, which must be made by the subdivider.

The point I want to make today is that the cost of filling this marsh area, as is frequently true in marsh projects, substantially exceeded the engineer's estimate. The possibility that this situation might develop was a primary consideration in setting up the project. Thus, the project was set up as an acquisition proceeding under the 1913 Act, with the work to be accomplished by the owner and the city's liability restricted not only by the proceedings, but also by a representation from the contractor that there would be no claims of any nature made against the city itself, or against the assessment fund. The risk in this project, which was definitely present, was purposely limited to the owners of the property. There was no way in which that risk could have been transferred to the city or to the assessment district. The shortage which I mentioned of some $75,000 has been made up by escrow transfers from the sale of a large portion of the property. The persons entitled to the money, primarily contractors who were doing the fill work, have been paid in cash. Some $41,000 was paid out of these escrow proceeds. Approximately $25,000 is of course owed by the developer to the contractor and is insured by a deed of trust on one of the apartment house sites, which remains unsold. The work of completing the improvements is progressing and it is expected that they will be completed shortly. The city has in its treasury in cash an amount which is more than adequate to complete the construction of the improvements.

BRADLEY: For the record, what do those improvements consist of - paved streets, curbs, gutters, sidewalks, sanitary sewers, storm sewers, street lighting?

JONES: That is correct. I don't believe it includes any street lighting, but all the other improvements you mentioned are included. Water should also be included.

BRADLEY: For the record, can you give any particular reason for the unusually high discount rate of 15 per cent?

JONES: I think the reason for the unusually high discount rate was the unusually high risk. This was a project which was based on the best engineering knowledge available. Extensive soil engineering analysis was undertaken and the engineers concluded that the job could be accomplished within the amount of the estimate. As is frequently true on marsh projects, however, more material was required to fill the marsh than the engineers had been able to estimate.

I would point out, however, that the net result of the situation is that a project has been substantially accomplished, which could not have been accomplished in any other way. Admittedly there was a risk involved, but it was not borne by the city.

I also have some very brief comments that I would like to make on the recommendations which have been submitted to the Committee today, and also some comments on the recommendations which are a part of the Sacramento transcript.

First of all, there was a mention made of the use of "public credit" through the device of special assessment proceedings, in order to finance what have been described as private developments. For purposes of clarity in the Committee's record, I would like to state that I am not aware of any law nor of any market practice which includes a 1911 Act bond within the description of obligations which would affect the credit structure of a city or a county in any way. The 1911 Act bond is secured solely by the property described in the bond, and there is no supplementary remedy of any kind involved. I question, therefore, the technical propriety of the use of this term "public credit" in referring to a 1911 Act bond. I can understand that there might be some indirect reflection on the credit of a political entity through the use of 1915 Act bonds. I would tend to discount this claim, however, because it is a custom of bond dealers to make themselves informed on the amount of 1915 Act bonds outstanding, for the specific reason that there is a possibility of city liability in the event of a delinquency.

The second point I want to make is that there never was any question of whether these acts could be used by private corporations. The proceedings must be conducted by public entities - cities, counties, or public districts. It may be that the result accrues to the benefit of a private corporation, but the conduct of the proceedings must necessarily be by a public agency.

The question was also asked as to when the 1913 Act was first used in a development situation. As the Committee knows, this act was on the statute books from 1913 to 1939 purely as an acquisition act for public utilities. As far as I know it was not used during that period in a development situation. I believe that there was some use of a similar procedure by charter cities during the late 1930's; this was without benefit of state law on the subject, however. It is quite probable that the first general law proceeding under the 1913 Act for development purposes, could not have taken place before the early 1940's, and I don't think that there was any extensive use of the act for development purposes until the late 1940's and early 1950's.

In regard to Mr. Hamilton's testimony I agree completely with the recommendations that he has made regarding the repeal and consolidation of dead wood in the Streets and Highways Code. As part of his presentation he stated that the 1911 Act was better suited to small projects. I concur with that statement and would amplify it by saying that the 1913 Act in general is better suited to large projects, because the construction period extends over a long period of time, and the financing at the beginning of a project makes cash more readily available.

I am not certain that it was Mr. Tillman's intent to recommend that the bomb and fallout shelter authorization in the 1911 Act be repealed. If he was suggesting that, however, I do not concur. Admittedly the desire for this type of proceeding is at an ebb now, but this might change at a later date. The procedure itself is a purely voluntary procedure on the part of a public agency. There's nothing that would compel an agency to use this procedure. If the City of Los Angeles didn't like it, they wouldn't have to use it.

Mr. Rogers suggested that if a petition had been signed by 100 per cent of the property owners that notice of hearing by posting and mailing would be an idle act. I urge that the elimination of any such notice be limited only to proceedings where it has been established authoritatively that all parties - including all forms of encumbrancers - are signers of the petition. Any such deletion of notice should be restricted only to those situations. It has been traditional that the one way of acquiring constructive jurisdiction over unknown encumbrancers was by posting the property in question. Thus, the encumbrancer could examine the property in which he was interested to see if there was a potential danger to his interests. The requirement of posting, therefore, does remain at least one way in which unknown encumbrancers may receive notice of any of these proceedings.

I also think that it is important to give the encumbrancers a place in the proceedings. They should be given an opportunity to be heard at the protest hearing. I'm inclined to think, therefore, that the term "any interested person" is about as good a one as any that could be devised to achieve this aim. These people are obviously interested, and as such they should have a voice.

Mr. Tillman recommended allowing work to be done on private property in situations which involve a change of grade. He said he was speaking about items of $200 or $500. I submit that the Committee should consider the situation in which a hill must be cut down for purposes of constructing a street. This procedure necessarily involves sloping of the grades along either side of the cut, in order to provide proper support. The change in grade, resulting from a substantial cut of that nature, is a much more aggravated problem than the rather small amount which was involved in Mr. Tillman's situation.

BRADLEY: Are we to conclude then, that you subscribe in principle to Mr. Tillman's suggestion for some limited procedure to allow improvements on private property, but that you would take it one step further and apply it to an even more aggravated situation?

JONES: Yes, that's my point.

BRADLEY: Mr. Britschgi.

BRITSCHGI: Mr. Jones, in terms of public relations, wouldn't you relieve 90 per cent of your problems if there was a requirement for a special notice of some kind to be sent to the homeowner in situations which involve a change of grade?

JONES: Well, the 1911 Act now provides that when the plans show a change of grade, the notices of improvement specifically must include that fact. The 1913 Act has a similar provision. Unfortunately, the homeowner reads that there is going to be a change of grade, but doesn't seem to understand what this term means. Notice is and has to be the answer. Perhaps we should insist upon "intelligible" notice. Notices in assessment proceedings specifically mention change of grade and a property owner is supposed to raise questions about this procedure at the time of the hearing. If a property owner does not raise this question at the hearing, then he is waiving his right to any damages. Maybe the notice could be amplified to state that fact.

I would also like to comment about reclamation work. The work of reclaming marsh and tide lands can be accomplished under State law at the present time by forming a reclamation district under the Reclamation District Act. This act has been on the books probably as long or longer than any other special district act in the state. Its purpose is limited to providing a means by which marsh lands or tide lands may be reclaimed. Admittedly, the improvement acts can be used after reclamation is complete, in order to place public improvements on the land. In such a case, a second lien is established on the area. I suggest that it is appropriate for the Legislature to face up to the necessity for reclaiming lands in this state, and to allow a procedure whereby both the reclamation work and the surface improvement work can be accomplished under one statute. This would avoid the complication of double proceedings and double liens. Financing under the Reclamation District Act is admittedly antiquated. The type of bond that results is not as marketable or as acceptable as the type of bond that results from a 1913 or 1911 Act proceeding. Because the problem of reclamation is an increasingly important problem to this state, we suggest that a legal procedure should be made available whereby all the elements of the improvement could be accomplished in one proceeding. To describe reclamation work as private work is contrary to hundreds, if not thousands, of adjudicated cases both in California and throughout the United States. The reclamation of land is a public improvement. It is work that intimately affects the economy of the public entity involved in the proceedings.

BRADLEY: How would you construct such an improvement without essentially improving private property? Are you talking about publicly-owned marshes?

JONES: No. The net result of reclamation work is private property. The net result of redevelopment work is also private property. In neither case does the private character of the property change the legal concept of either reclamation or redevelopment as public improvements. Both reclamation and redevelopment are types of projects which can appropriately be accomplished by public bonds and public financing, even though the net result is private property.

BRADLEY: Just how would you suggest that the 1911 Act and/or the 1913 Act be amended so that they would apply to reclamation work?

JONES: The work of reclamation, namely fill or levees, etc. could be included among the improvements which would be authorized under the act. The 1911 Act already includes breakwaters, levees, and that sort of thing. It does not expressly include the word "fill" Admittedly, you are creating private property, but it has a long-range public purpose. The marsh property in the Larkspur project had been sitting in a marsh condition ever since 1904, producing virtually nothing for the city tax roll.

BRADLEY: Initially, however, the developer acquired the property in Larkspur from the original owner. Then as an individual he initiated the proceedings to improve the property for development purposes.

JONES: It's a matter of sematics, isn't it Mr. Chairman? You say that this is work on private property and therefore should not be classified as a public improvement. I say that the courts have characterized reclamation work generally as a public improvement and, therefore, why shouldn't such work be appropriate under the assessment acts, as well as under the general reclamation statute. Redevelopment is the same thing. It consists in acquiring private property to improve it to a higher standard, but the net result again is private property.

BRADLEY: Are you suggesting that reclamation should always be done in connection with some other project, for example a subdivision development? Does the reclamation process have to be connected with something else, or is it a complete and separate procedure?

JONES: I am suggesting only that work which is commonly accepted as reclamation work should be authorized as one of the improvements which can be constructed under the provisions of the 1911 Act and the 1913 Act. My point is that the reclamation procedure is not a complete procedure in the sense that it cannot be used by itself to make unuseable land into useable land.

There are also many comments I might make on Mr. Hess' testimony. I will make only one comment at this time, however. The courts of the State of California have stated that the levy and collection of assessments in advance of construction of public improvements is "not only within the governmental power, but also consistent with the best public policy". I would like this point noted in the record, and I would like it noted further that we are in disagreement with Mr. Hess in his opposition to the 1913 Act. I ask that we be allowed to see a copy of his report, so that we may put a response to it in the record.

BRADLEY: This can be arranged.

JONES: I would like to add one final thing, Mr. Chairman - we don't really dislike the 1911 Act.

BRADLEY: Mr. Lanterman.

LANTERMAN: You mentioned a 15 per cent bond discount in the Larkspur project. What caused that?

JONES: The reason for the 15 per cent bond discount was the obvious and rather extraordinary risk that was involved in the project. The land was marsh land which was virtually valueless at the time the proceedings were initiated. I think that the bond holder felt that he was entitled to a large bond discount, in order to compensate him for the risk that he was taking. The bond buyer put up 85 per cent of $390,000 in hard cash. This was a lot more money than the property was worth in its unimproved state.

LANTERMAN: Thank you.

BRADLEY: Mr. Ray Lindman, please.

RAY H. LINDMAN, Attorney at law: Mr. Chairman and members of the Committee. My name is Ray H. Lindman. I am a partner in the law firm of O'Melveney and Myers in Los Angeles. Among other things, my office does public financing work and acts as municipal bond counsel for many public agencies. My statement will be very brief, because I don't think anything will be served by repeating what has already been said.

I believe that what Mr. Rogers and Mr. Hamilton told you this morning represents the concensus of opinion among a number of various assessment bond dealers and assessment bond attorneys. I agree with the point that they have made and I won't repeat them. I commend to your special attention the recommendations that Mr. Hamilton made in regard to the elimination of dead wood and possible consolidation.

As has been indicated by a number of the prior witnesses, primarily the 1911 Act has been used for assessment proceedings in southern California; the 1913 Act has been used very little. I think, however, that you should be aware of the fact that the use of the 1913 Act is increasing in southern California. It will continue to increase because there are some perfectly ligitimately reasons why in certain instances the 1913 Act affords some advantages not available under the 1911 Act. Some of these advantages have not been mentioned up to this point. Let me give you just one example. The 1913 Act was used in connection with the development of a pedestrian mall in the City of Pomona. Under a 1911 Act proceeding there must be only a single contract awarded to a single contractor for all of the work. This is necessary, because the contractor will be paid by being issued the warrant on the assessment, and there is no way of dividing the warrant among several contractors. Under the 1913 Act, on the other hand, the work may be divided among several contractors, because the contracts are awarded on a cash basis. This is a particular advantage when a project involves several different types of work. One contractor may be suitable for one part of the work and not another. I mentioned the beautiful Pomona pedestrian mall simply because this is a good illustration of that point. A large part of the work was ordinary street work, installation of sidewalks, etc. A very vital part of the work was more aesthetic; it included the installation of the planters, the trees, the fountains, etc. It is easy to see that it would be difficult to combine these two types of work under a single contract. For this very reason, the City of Pomona specifically requested to use the 1913 Act proceeding.

I have carefully studied the transcript of the Committee's June hearing in Sacramento and the report of the Attorney General filed with the Committee at that time. The case histories used by the Attorney General indicate to me that nearly all of the problems he cites flow from the concept of the 1913 Act, which permits making a contract to acquire improvements which do not exist. In our office we have never been willing to give the 1913 Act that interpretation. This position is concurred in by a number of assessment bond attorneys in this state. In addition you now have before you the opinion of the Attorney General to the same effect. In light of this opinion, it might be argued that it would be unnecessary to amend the 1913 Act in this regard. Under the circumstances, however, I think it would be wise to amend the statute to make it crystal clear that the acquisition power can be exercised only in situations in which the improvements have already been completed and are in place at the time the contract for acquisition is made. If this step is taken, I think that most of the problems disclosed in the Committee's prior hearing will have been solved.

This completes my statement, Mr. Chairman. I will be very happy to answer any questions.

BRADLEY: Mr. Lanterman.

LANTERMAN: The 1911 and the 1913 Acts provide alternate procedures for constructing public improvements. Under the 1913 Act the contractor is paid in cash and under the 1911 Act he is paid out of warrants. Why isn't it possible to include both of these alternatives in one act?

LINDMAN: If you did provide such an alternate procedure in the 1911 Act, you would probably end up adding to the 1911 Act the present provisions of the 1913 Act. Maybe the form would be somewhat different, but that's essentially what you would be doing.

LANTERMAN: So then you might as well have the two acts to keep the process separate?

LINDMAN: That's exactly true, Mr. Lanterman.

BRADLEY: Any other questions?

LINDMAN: With your permission, Mr. Chairman, I would like to make a very brief report on another matter.

BRADLEY: Yes, Mr. Lindman.

LINDMAN: You will recall that earlier this year, I agreed to prepare for the Committee a proposed bill amending the Municipal Sewer District Act of 1911 and repealing the uncodified Municipal Sewer District Act of 1939. The job involved considerably more work than I had originally anticipated, but it is now completed and I present to the Committee the proposed bill, together with an explanation of it. Copies have already been sent to the Committee's office in care of Mr. Willoughby, and a copy will also be made available to each member of the Committee. I have also sent a copy to Mr. Lourimore, of the Legislative Counsel's office, who is interested in this subject matter, and have sent copies to various municipal bond counsel in the state, and invited their comment on this draft.

BRADLEY: I would like the record to show, Mr. Lindman, that the Committee accepts the very fine piece of work which you have presented to it. The Committee will certainly follow up on your work, and in all probability legislation will be introduced to effect this consolidation.

BRITSCHGI: Mr. Chairman, I think Mr. Lindman should be congratulated and thanked very highly for the effort that he has made in drafting this proposed legislation.

LINDMAN: Thank you.

BRADLEY: This concludes the part of our hearing on the subject of the Improvement Acts of 1911-13-15. We will now proceed to a consideration of the use of independent special districts in land development situations.

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OFFICE OF THE ATTORNEY GENERAL
**Department of Justice**
STATE BUILDING, SAN FRANCISCO 2

September 14, 1962

TO: ALL DISTRICT ATTORNEYS, COUNTY COUNSELS AND CITY ATTORNEYS

FROM: THE OFFICE OF THE ATTORNEY GENERAL
INVESTMENT FRAUDS UNIT

RE: USE OF SPECIAL DISTRICTS AND SPECIAL ASSESSMENT DISTRICTS TO PROVIDE CAPITAL FOR PROMOTIONAL LAND DEVELOPMENT

The Attorney General in cooperation with the Assembly Interim Committee on County and Municipal Government, has had occasion to review the use of Special Districts and Special Assessment Districts by land developers.

It appears that in certain areas of the State, abuses have arisen endangering the public funds provided through the use of these acts by land developers. It may be helpful to draw attention to some of the problems that have been encountered.

1. Assessment District Proceeds Not Used for Public Purposes.

   In opinion 61/90 (enclosure #1) we discussed the impropriety of using bond proceeds for on-site grading which benefited primarily the subdivision promoter. In our first report to the Assembly Interim Committee (enclosure #2) we found bond proceeds being used to pay for subdivision reports, engineering of sites and establishment of reserves for interest and principal payments, as well as padded items of engineering expense.

2. The Pseudo Acquisition Concept.

The report to the Committee points out that the Improvement Act of 1913 was being employed under a pseudo "acquisition" theory whereby improvements would be constructed and acquired on a piecemeal basis.

Using this theory, the safeguards of public bidding, material lien and performance bonds were avoided. Investigations revealed that projects were undertaken and bond proceeds disbursed without improvements being installed or completed. Since no performance or lien bonds were required, the county lost expected improvements, the bondholders lost their expected security, and the labor and materialmen lost the expected value of their services. In response to an opinion request from Assemblyman Clark L. Bradley, Chairman of the Assembly Committee on Municipal and County Government, we advised that the 1913 Act did not authorize such "piecemeal acquisition," and only permitted acquisition of improvements in place at the time the engineer's report is presented to the legislative body.

3. Avoidance of the Majority Protest Act.

Although the 1931 Majority Protest Act establishes a limitation on the ratio of indebtedness to assessed value of the land, this provision can be waived by the landowner. Consequently, in some cases, land has been overburdened to the extent that economic development is no longer feasible. Where 1915 Bonds are used, the resulting burden of a default is shifted from the developer to the taxpayers of the county.

In our second report to the Legislature (enclosure #4), we have described the use of the special districts to provide utility services and off-site improvements for subdivision development. Because these districts are independent of local authorities and state regulatory agencies, there is the ever present danger of financing uneconomic improvements and the exploitation of the municipal powers of the district.

While some counties and municipalities protect themselves by stringent or non-use of the 1913 or 1915 improvement acts and special district laws, others have established screening committies of local officials to carefully examine all proposals for both feasibility and conformity to local requirements.

Our investigation also indicated that heavy reliance is being placed by local legislative bodies on extra-legal safeguards as may be provided by bond counsel and bond underwriters.

While these may be valuable, they certainly do not justify disuse of the existing safeguards.

The study of the application of improvement acts has indicated the need for increasing emphasis upon:

1. Performance bonds.
2. Mechanics and labor lien bonds.
3. Public bidding.
4. Voucher disbursements supported by certificates of responsible local officials.

We hope that the attached matter may be of assistance in this regard.

* * *

Enclosures: Opinion No. 61/90
Opinion No. 62/167

OFFICE OF THE ATTORNEY GENERAL
State of California

STANLEY MOSK
Attorney General

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| OPINION | |
| of | No. 62/167 |
| STANLEY MOSK<br>Attorney General<br>Marshall S. Mayer<br>Deputy Attorney General | September 12, 1962 |

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THE HONORABLE CLARK L. BRADLEY, CHAIRMAN, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, CALIFORNIA LEGISLATURE, 28TH DISTRICT, SANTA CLARA COUNTY, has requested the opinion of this office on the following questions:

(a) Whether a political subdivision acting pursuant to a resolution of intention adopted under the Municipal Improvement Act of 1913 "to acquire" property or improvements may proceed to authorize the issuance of bonds and to disburse the proceeds of said bonds in advance of completion and acceptance of such improvements by the proper governmental authority?

(b) If the answer to section (a) above is affirmative, is a political subdivision in such circumstances required to adhere to the provisions of Streets and Highways Code of sections 10500-10509 (Municipal Improvement Act of 1913) regarding bidding and awarding of contracts?

The conclusion is:

A political subdivision acting pursuant to a resolution of intention adopted under the Municipal Improvement

Act of 1913 may not authorize the issuance of bonds and disburse the proceeds for the purpose of "acquiring" capital improvements which are not described as being installed in the engineer's report required by Streets and Highways Code section 10204.

## ANALYSIS

The Municipal Improvement Act of 1913, codified in Streets and Highways Code sections 10000 to 10609, (hereinafter all statutory references are to this code unless otherwise specified), provides a procedure whereby public agencies and municipalities may "acquire" or "install" improvements and assess the costs of the improvement against the district of land which is to be benefitted thereby.

Section 10100 and section 10102 list the specific improvements which "any municipality may install."

Section 10006 defines the term install: "'Install' includes construct, reconstruct, extend, repair, and maintain."

An alternative method of obtaining improvements is provided by section 10101 and section 10102. Section 10101 authorizes the legislative body of a municipality to "acquire any works or appliances /utility transmission lines/ already installed . . . and any plants, lands, and rights of way . . . or may acquire the use of any such works, appliances and other property." Section 10102 allows the acquisition of "any or all of the works or improvements mentioned in the Improvement Act of 1911. . . ."

Section 26 defines "acquire":

> "As used in the general provisions and in Divisions 1 and 2 of this code, unless the context or a specific provision otherwise requires, 'acquire,' or any of its variants, when used with reference to real property or any interest therein, includes but is not restricted to:
>
> "(a) Taking by condemnation, purchase or lease.
>
> "(b) Receiving by donation or dedication.

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> "(c) Taking or receiving in or by any manner by which any right, title or interest in or to real property is capable of being transferred."

The procedure for obtaining improvements either by acquisition or installation begins with the adoption of a resolution by the legislative body declaring its intention to order the improvements described, specifying the assessment district boundaries, and providing for the issuance of bonds (sec. 10200). In the resolution the body is required to refer the proposed improvements for an engineering report (sec. 10203). The legislative body passes on the report and then by resolution appoints a time and place for hearing protests (sec. 10301). The report is required to contain, in addition to cost data and an assessment diagram, two separate analyses:

> "(a) Plans and specifications of the proposed improvement if the improvement is not already installed.
>
> "(b) A general description of works or appliances already installed and any other property necessary or convenient for the operation of the improvement, if the works, appliances, or property are to be acquired as part of the improvement." (Sec. 10204. Emphasis added.)

If following public hearings the proposed assessment is confirmed, "the legislative body shall order the proposed improvement to be made or acquired, and declare its action upon the report and assessment." (Sec. 10312.)

Chapter 6 (secs. 10500 to 10509) prescribes the manner in which the mandate of the legislative body is carried out. Section 10500 provides:

> "At any time after the preliminary approval of the report provided in Section 10300, the legislative body may let the contract or contracts for all or any part of the improvement and authorize such acts and proceedings as are necessary to acquire works or appliances already installed, or other property, as authorized by this division."

The procedures are once again dichotomized on the basis of whether improvements are to be installed or acquired. It might be argued that as used in section 10500 the words "or other property," establishes a third procedure for obtaining capital improvements. However, it is more reasonable to

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> "(c) Taking or receiving in or by any manner by which any right, title or interest in or to real property is capable of being transferred."

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The procedures are once again dichotomized on the basis of whether improvements are to be installed or acquired. It might be argued that as used in section 10500 the words "or other property," establishes a third procedure for obtaining capital improvements. However, it is more reasonable to assume that the "other property" mentioned is complementary to sections 10204 and 10101 which permit acquisition of other property such as electric current, gas, or other illuminating agent required in the operation of a utility. Obviously this type of property is not susceptible of being acquired in place or being installed.

A further illustration of the complete separateness of the acquisition and the installation concepts is provided by sections 10501 - 10509 which detail the procedures and safeguards required when the proposed improvements are to be installed.

The Legislature has established the requirement of obtaining public bids to assure reasonable costs and surety bonds to ensure the completion of the project and the discharge of liens.

Section 10503 authorizes "approval of and payment for completed portions of the work as it progresses" pursuant to a construction contract but provides that "payment . . . shall not constitute final acceptance of these portions or of the completed project." No provision analogous to section 10503 is provided where the improvements already installed are to be acquired. This is consistent with the absence of authority to acquire improvements on a piecemeal basis, which improvements are constructed subsequent to the engineer's report.

This preliminary summary will facilitate an analysis of the first question, whether bonds may be authorized and proceeds disbursed in advance of the completion of improvements which a municipality has resolved "to acquire"? If the term "acquire" is construed to mean "install," this procedure would appear proper. However, the definition of the statutory term "install" clearly excludes the meaning "acquire"; the definition of "acquire" as used in the Streets and Highways Code is also incompatible with a concept of "construction." Thus, to contend that construction can be accomplished within the meaning of the term "acquire," besides doing violence to the statutory definitions, also is diametrically opposed to the general scheme which the Legislature has prescribed.

In view of this conclusion, the question of the stage of completion of the improvement and whether it had been accepted by the legislative body would appear to have no relevance.

Our conclusion to the first question being negative, no reply is required to the second question.

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OFFICE OF THE ATTORNEY GENERAL
State of California

STANLEY MOSK
Attorney General

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OPINION

of

STANLEY MOSK
Attorney General
Richard W. Giauque
Deputy Attorney General

No. 61/90

MARCH 13, 1962

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HONORABLE WILLIAM H. CARD, COUNTY COUNSEL OF SANTA CRUZ COUNTY, has requested the opinion of this office on the following question:

May the board of supervisors include in assessments levied under the Municipal Improvement Act of 1913 and the Improvement Act of 1911 the cost of site grading of lots in a subdivision within a proposed improvement project area?

The conclusion is:

The board of supervisors may not include the cost of site grading in an assessment levied under either the 1911 or 1913 Improvement Act unless, in its opinion, such work is absolutely required in the interest or convenience of the public, e.g., site grading to provide needed fill for construction of public streets or proper drainage protection for those streets.

## ANALYSIS

The inquiry is whether the scope of the work undertaken in an improvement project may include the grading of subdivision lots located within an improvement project area. Essentially the problem is one of determining the extent of which private lands may be improved under acts which purport to authorize only public improvements.

Both the Municipal Improvement Act of 1913 (Sts. & Hy. Code secs. 10000-10609; hereafter all section references are to the Sts. & Hy. Code unless otherwise specified) and the Improvement Act of 1911 (secs. 5000-6794) define the improvements which may be authorized when, in the opinion of the board of supervisors, the public interest or convenience require them:

Under section 5101 of the Improvement Act of 1911, the board may order "the streets, places, public ways, or property, or rights of way, or tidelands, or submerged lands owned by any city, open or dedicated to public use, and any property for the immediate possession and use of which as rights of way required for public use, an order has been obtained in compliance with the provisions of section 14 of Article I of the State Constitution, to be improved by or have constructed therein, over or thereon . . .:

"(a) The grading or regarding . . . thereof.

* * *

"(n) All other work which may be deemed necessary to improve the whole or any portion of such streets, places, public ways or property, or rights-of-way owned by such city.

"(o) All other work auxiliary to any of the above, which may be required to carry out the same."

Moreover, in any proceeding for any work or improvement authorized under section 5101, the board may order the acquisition of lands, rights-of-way and easements "necessary or appropriate in connection with such work or improvement and assess the cost of such acquisition, as a part of the incidental expenses of such work or improvement. . . ." (sec. 5102) (See also secs. 5023.1 and 5024(h))

Similarly, under section 10100 of the Municipal Improvement Act of 1913, the board "may install in or along its streets . . .:

* * *

"(e) Any work, utility, or applicances necessary or convenient for providing any other public service."

Furthermore, under section 10102, the board "may acquire or install any or all of the works and improvements mentioned in the Improvement Act of 1911 *or other works and improvements of a local nature*, and acquire by gift, purchase, or eminent domain proceedings land, rights of way, and easements necessary for such works and improvements." (Emphasis added)

The steps to be taken in effecting an authorized improvement are strictly defined by the particular improvement act involved. The 1911 Act assesses the cost of the public improvement against the property to be benefited. (secs. 5315, 5341) Acting pursuant to that act, if the board decides that the public interest requires certain improvements, it will ask the county surveyor to submit cost estimates and work plans. (sec. 5130) Then, before the board orders work, it must pass a resolution of intention to do the work. (sec. 5131) A resolution of intention in a street improvement proceeding is the primary declaration by the board that it will order a given work of improvement to be undertaken. (*St. John* v. *King*, 130 Cal. App. 356, 365) The resolution must contain an adequate description of the contemplated work. (secs. 5131-2) One resolution may include several proposed improvements. (sec. 5134) After the resolution of intention is passed, assessment proceedings are held and assessments are levied against those properties within the bounds of the improvement project. (secs. 5315, 5343) The description in the resolution of intention of work to be done limits the nature of work which the board may properly authorize, and only those expenses the board is empowered by the acts to incur in effecting the improvements may be included in the assessments levied. (See *Wilcoxon* v. *San Luis Obispo*, 101 Cal. 508) Once levied, these assessments become a lien upon the lots within the project area. (sec. 5372) The property owner may either pay the assessment in case or permit a 1911 Act improvement bond to be issued and sold to pay for the public

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improvement. (secs. 6420-22) This bond represents the assessment, and its holder thus acquires a lien upon the property assessed. (sec. 6446)

The procedures for effecting an improvement authorized under the 1913 Act are similar in all pertinent respects to those under the 1911 Act and often 1911 Act bonds will be issued to finance improvements acquired or constructed under the 1913 Act. However, the scope of improvements authorized under the two acts is not necessarily the same. Each of the acts contains provisions which specifically enumerate certain works which may be authorized. (secs. 5101(a)-(m); 10100(a)-(d)) Each act also contains substantial omnibus provisions enlarging the scope of authorized work beyond those enumerated. (secs. 5101(n)-(o); 10100(e)) The 1913 Act further provides that in addition to all improvements authorized under the 1911 Act, the board may authorize any "other works and improvements of a local nature." (sec. 10102) It is clear that the 1911 Act requires that the property upon which work is ordered must be public property or other property whose improvement is necessary or auxiliary to work on public property. (sec. 5101) The 1913 Act, however, does not similarly limit the type of property upon which improvements may be undertaken, and it is arguable that this act authorizes "work of a local nature" upon wholly private property. Nevertheless, whether undertaken upon public property or private property, an improvement cannot be authorized under either act unless it has a public purpose. (See Federal Construction Co. v. Ensign, 59 Cal App. 200, 209-11)

It thus becomes necessary, in analyzing the question of whether site-grading of subdivision lots may be authorized under either the 1911 Act or the 1913 Act, to determine if the public property requirement of the former act and the public purpose requirement of each of the acts would be satisfied by such work.

Section 5101 (n) and (o) of the 1911 Act makes clear that any grading work done on privately-owned subdivision property must not only be required by public interest and convenience, but done upon property which qualifies as streets, places, public ways or property, or rights of way owned by a county which are dedicated to or required for public use. (sec. 5005 defines "city" to include counties.)

The authority conferred on a county to improve streets contemplates the improvement of *public* streets. (See 27 Ops. Cal. Atty. Gen. 369, 371) Certainly subdivision lots cannot qualify within the meaning of the act as public streets. (California v. U. S., 169 F.2d 914, 919; and see sec. 5014) Nor can such lots qualify as "places", a term limited to "any public park or pleasure ground and common *which has been dedicated* and accepted according to law." (sec. 5018) (Emphasis added)

While private subdivision property cannot qualify directly as public property without first being dedicated to public use, the question is raised whether it may be indirectly constituted as public property for improvement purposes by virtue of the county holding an easement to it. Such a possibility is provided for by section 5102, whereunder a county may acquire rights of way for the work it orders done. (An easement and a right of way are synonymous. Civ. Code sec. 801 (4)) It has been suggested that the county may order grading done in any place that constitutes a public place and that a subdivision tract can be constituted a public place for these purposes by having the lot owners grant to the county a tract-wide easement for grading which would terminate upon ceassation of the improvement work. The rights of way or easements which the county may acquire under section 5102 must be dedicated to or required for public use however, and in our opinion the bare grant of such a temporary easement as suggested will not itself satisfy this requirement of the 1911 Act. The "public use" required under the act is the same as that required for exercise of the power of eminent domain (*Friesen* v. *City of Glendale*, 209 Cal. 524, 530), and cases in that area have held that there is no constitutional objection to a grant of authority to take certain easements to lands lying outside the boundaries of a public way. However, such easements may be taken only when they are incidental to the construction of the public way, and include the right to slope earth upon abutting property when the grade of the way is higher than that of the land through which it is laid out (*Eikenberry* v. *St. Paul RR.*, 174 Iowa 6, 156 N.W. 163), the right to take gravel and other materials for constructing the way from convenient places (*Hatch* v. *Hawkes*, 126 Mass. 177), and the right to cut ditches and drains upon land adjacent to public ways for the purpose of carrying away surface water from the way so that the way itself will be safe and convenient for travel after heavy rains (*Palmer* v. *Harris County*, 29 Tex.

Civ. App. 340 29 Tex. Civ. App. 616, 69 S.W. 229). Similarly, we conclude that an easement to do site-grading may not be taken under the 1911 Act unless it is necessary or required for completion of streets or other work having a public purpose. Otherwise, a temporarily-granted easement to make essentially private lot improvements unrelated to the accomplishment of a public improvement could be utilized as a means of subterfuge for avoiding the "dedicated to public use" requirement of the act.

Thus, the 1911 Act requires that improvements be constructed only upon streets or public rights of way which are either owned by a municipality and "open or dedicated" to a public use at the inception of the proceedings, "or which may thereafter be opened or dedicated to a public use," and in the latter case the requirements of the statute are met if the land asserted to be privately owned is lawfully dedicated or acquired prior to the entry of a judgment in any given action attacking the validity of the proceedings on that ground (St. John v. King, supra, 130 Cal.App. at 360).

In addition to these requirements concerning the public nature of the property involved, an improvement under the 1911 Act must, in purpose, be a public one; that is, it must be one which confers a general benefit on the public at large. (Federal Const. Co. v. Ensign, supra) This requirement, however is not unique to the 1911 Act. It also applies to work done under the 1913 Act and all other acts authorizing "public improvements." The "public improvements" contemplated by all these acts include only those improvements which are the proper subject of police and local government regulation and do not include private affairs or commercial enterprises. (See Low v. City of Marysville, 5 Cal. 214; Wiley v. City of Aberdeen, 123 Wash. 539, 212 Pac. 1049; State v. Walla Walla County, 5 Wash. 2d 95, 104 P.2d 76l ) Thus, if an improvement project initiated pursuant to either the 1911 Act or the 1913 Act has no "public purpose," its cost cannot be included in an assessment levied thereunder. (Cf. Islais Creek Reclamation Dist. v. All Persons, 200 Cal. 277, 282)

Applying the foregoing authority to the present inquiry, it is concluded that, even apart from the nature of ownership of the property involved, a single plan for both street grading and adjacent subdivision lot grading may be authorized by the board only if there is a clear public purpose to be served in undertaking such extensive work. While seemingly few in number, there are certain instances when this requirement could be satisfied. For example site-grading may be authorized when it is a necessary incident to the completion of a street improvement (see sec. 5101 (n) and (o); sec. 10100 (e); and sec. 10102), as in instances where the earth provided by such grading is either acquired by the county as fill to be used for raising the streets up to the proper level or removed by it and deposited on abutting private land in order to lower streets to the proper level. The fact that the fill is taken from or deposited on private lots which as a result are leveled for building sites is immaterial, because in each instance this private benefit is merely an incidental result of work clearly having a public purpose.

Similarly, site grading may be authorized by the board if it is deemed absolutely necessary for the protection of streets and other public lands from the dangers of unusual runoff. Even so, such preventive drainage work on inhabitable subdivision land must be distinguished from restorative drainage work on uninhabitable land, i.e., reclamation. (See Laguna Drainage Dist. v. Martin Co., 144 Cal. 209, 213) Reclamation is the means by which swamp and overflowed land is rendered fit for cultivation. (Ballantine's Law Dictionary, 2nd Edition) Inasmuch as reclamation promotes the public welfare by adding to the productive and inhabitable area of the state, such work has a public purpose and can be carried out under the police powers. (Hagar v. Yolo County, 47 Cal. 222; Grey v. Reclamation Dist. No. 1500, 174 Cal. 622, 638)

It has been suggested that site-grading of subdivision lots might be done under the 1911 Act or 1913 Act as a type of "reclamation". It is clear that when privately-owned land is filled, graded, or reclaimed in such a way as to transform it from uninhabitable land to inhabitable land, the cost of such reclamation can properly be included in an assessment proceeding where the work is done in an area formally declared to be a reclamation district. (Water Code secs. 51200-51894) Whether the cost of such work can be included in an assessment proceeding under the 1911 or 1913 Act is not as clear. Authority to do reclamation work as such is not provided for in the 1911 Act. The board may order the improvement of "tidelands" or "submerged lands", but only if such lands are owned by the county or dedicated to public use. (sec. 5101) A

61/90

reasonable construction of the general provisions authorizing improvements under the 1913 Act would similarly preclude an order for such work. Those provisions purport to authorize only improvements providing service for water, gas, power, lighting and other public utilities. (secs. 10100-101) The omnibus clause in section 10102 of that act, however, might be construed to allow some grading as a "local improvement" in the form of reclamation work. The suggestion that this would also include site-grading of subdivision lots is apparently predicated upon a theory that when land is leveled for building sites, it is "reclaimed" in the sense that an increase in the inhabitable area of the site is thereby effected. While it is true that such an increase would be effected, the assertion that this itself constitutes reclamation is manifestly unsound. Lands "reclaimed", in the ordinary sense of the word, are those which are of such a character that they are not likely to be improved by the investment of private labor and capital. (See Laguna Drainage Dist. v. Martin Co., supra) It would be anomalous to apply the term "reclamation" to the work of leveling a tract of land which is already divided into lots in anticipation of further commercial development. For this reason it is concluded that, in the absence of facts indicating that the subdivision lots are in need of restorative drainage or other salvage work, the mere site-grading of such privately-owned land does not constitute reclamation. Thus, it does not in that sense serve a public purpose and cannot be authorized under the 1911 or 1913 Act. Moreover, preventive drainage, e.g., providing the proper slope for runoff of moisture expected in the future, cannot be ordered done by the grading of such land pursuant to an improvement project under either act except where failure to do such work would endanger the usefulness of the adjacent streets or other public lands.

When site grading is not necessary to provide street fill or drainage protection for streets, or when site grading would only provide a private benefit to the subdivider or the owner of the subdivision lot, the board may not order such work done. Were it to do so, its order for such grading and all subsequent proceedings would be without authority and ineffectual to create liens upon the assessed property. (See In re Market Street, 49 Cal. 546; Spaulding v. Bradley, 79 Cal. 449; Spaulding v. Wesson, 115 Cal. 441) Subdividers are usually responsible for financing the grading and sloping of subdivision lots, and are required by the Subdivision Map Act to provide for proper drainage as a measure of protection for purchasers of those lots (City of Buena Park v. Boyar, 186 Cal. App.2d 61; and see Bus. & Prof. Code sec 11511). Accordingly, there is no need to relieve a subdivider of these obligations and allow them to be accomplished as part of a general grading scheme simply because his subdivision constitutes the major part of the territory within the bounds of a proposed improvement project, for it is not the purpose of the improvement acts to finance private subdivision work by municipal bonds.

* * *

"Where City Pride is Justified"

# CITY OF ROSEMEAD

MAYOR,
**ARNOLD C. ANDERSEN**
MAYOR PRO TEM,
**JOHN D. PHINNEY**
COUNCILMEN,
**WALLACE A. JACKMAN**
**STUART H. MAUDE**
**HENRY E. STEAD**
CITY ADMINISTRATOR,
**MILTON R. FARRELL**
CITY TREASURER,
**NOAH A. STUMP**
DEPUTY CITY CLERK,
**EDYTHE C. ARMSTRONG**
ATTORNEY
**GLENN R. WATSON**

October 8, 1962

Assemblyman Clark L. Bradley
Chairman, Assembly Interim Committee
on Municipal & County Government
Assembly Post Office
State Capitol
Sacramento 14, California

Dear Mr. Bradley:

I appreciate the opportunity to present some technical changes to Chapter 27 of "The Improvement Act of 1911", and regret not being able to attend your recent hearings in Los Angeles.

The City of Rosemead has initiated an intensive program to improve City streets with concrete curbs, gutters, driveway aprons, and sidewalks. Through the use of this act, property owners desiring such improvements may circulate a petition and if owners of more than 60% of the front footage on a particular block sign a valid petition the City may require the remaining property owners to install their improvements. At the end of sixty (60) days, the City is authorized to cause the construction to be done and collect the cost from the property owner.

Since the City can usually obtain lower bids for work of this type than the individual property owner, property owners in most cases wait out the sixty (60) day period thereby authorizing the City to proceed with the installation of the improvements.

The Rosemead City Council has adopted a policy of assisting property owners by distributing brochures on the necessary procedures and costs, and by preparing the necessary petitions including typing in the names of property owners as shown on the last equalized assessment roll. The City also pays the cost of surveying, engineering, inspection and paving the street upon completion of the improvements.

8815 EAST VALLEY BOULEVARD, ROSEMEAD, CALIFORNIA
ATLANTIC 7-0781
CUMBERLAND 3-4371

I have enclosed a copy of our City newsletter which contains several articles on the use of this law in our City. As pointed out in the newsletter, we have installed nearly 14,000 lineal feet of curb and gutter since July of 1961 with a great deal more scheduled for construction before the end of the current fiscal year. This means that the City, during this period of time, has had to deal with a large number of property owners in serving notices, etc.

With this background, we would like to suggest the following amendments to this Act:

1. Notice to Construct (Sec. 5876) and Notice of Cost (Sec. 5881)

One of the most cumbersome features of the law is the method required in the notification of property owners. The City Superintendent of Streets is required to personally serve these two official notices to the property owner, or post the notice at the property and in addition mail a copy to the property owner as shown on the last equalized assessment roll.

It is felt that sufficient notice could be given the property owner by mailing only. If more notice is desired, perhaps the notice could be advertised once in a local newspaper. We are quite sure this would be more than enough notice and would greatly simplify the procedure.

2. "Block" and "Driveway" Defined (Sec. 5870)

The definition does not appear to be completely clear in regard to the points used at each end of the block in determining the required footage. At most corners, the property line curves around the corner to meet the adjacent street right-of-way. Normally, improvements such as curb and gutter are constructed around the corner to meet the adjacent street curb line. I have enclosed a curb and gutter plan which indicates the curved section of the curb (curb return) in red and a typical corner property line in blue to indicate our problem.

We recently had a petition submitted which included signatures of owners of 60% of the front footage on the portion of the block within the City, but this was an extremely long block and more than half of the block was in unincorporated territory.

To clarify this law in regard to these two problems, perhaps the definition could read as follows:

> "As used in this chapter, "block" means property facing one side of any street, including the curved portion of a corner lot, between the next intersecting street right-of-way, or between the terminus of a dedicated street and an intersecting street right-of-way, or between a City boundary and an intersecting street right-of-way, and.........."

3. Scope of Chapter: Etc. (Sec. 5871)

In keeping with the above amendments, this section could perhaps be clarified by authorizing the "curb return" section on a corner lot as part of the improvements on a block.

At the present time no provision has been made for the collection of incidental expenses incurred by the City in carrying out the procedure of this Act. It is felt that it would be appropriate to add a section authorizing the City to add a nominal charge for such expenses as mailing notices, expenses of forms, additional bookkeeping involved in the assessment procedure, etc. The amount expected to be added if such a provision were made would involve perhaps a maximum of $2.00 per lot.

I would like to thank the Committee for allowing me to present my viewpoints and recommendations for technical changes to Chapter 27 of the 1911 Act. Again I would like to emphasize that this particular law has been quite helpful to our City and I am sure our street improvement program would not be possible without it.

Sincerely yours,

MILTON R. FARRELL
City Administrator

MRF:p
Enc:

ROSCOE R. HESS
ATTORNEY AT LAW
1128 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES 13
MADISON 6-1301

October 3, 1962

Mr. Thomas H. Willoughby, Committee Consultant
Assembly Interim Committee on
Municipal and County Government
5016 State Capitol
Sacramento, California

Dear Mr. Willoughby:

I am transmitting herewith my more detailed objections to the Municipal Improvement Act of 1913 than set forth at the hearing in Los Angeles on September 24th.

I am sending a copy of this letter and objections to Wilson, Harzfeld, Jones & Morton.

Very truly,

Roscoe R Hess

ROSCOE R. HESS

RRH/vt

cc: Wilson, Harzfeld, Jones & Morton
630 North San Mateo Drive
P.O. Box 152
San Mateo, California

Roscoe R. Hess
Attorney at Law
1128 Rowan Building
458 South Spring Street
Los Angeles 13
Madison 6-1301

October 2, 1962

To the Honorable
Assembly Committee on
Municipal and County Government
Sacramento, California

Gentlemen:

Pursuant to the authorization of the Chairman, I am setting forth in more detailed form than at the meeting of September 24, 1962, my opposition to the Municipal Improvement Act of 1913.

First, I am assuming that if the entire 1913 Act is not repealed, there will be amendments that will in one form or another, provide as follows:

1. Prohibit acquisition of non-existent improvements.
2. Require competitive bidding on all construction contracts.
3. Require labor and material and faithful performance bonds in all cases.
4. Require competitive bidding on sale of improvement bonds.
5. Prohibit the inclusion in the assessment of any amount to represent a "Reserve Fund."

I am therefore outlining my objections to the statute as it would then stand after such amendments.

## ONE WAY OR ANOTHER, THE PROPERTY OWNER UNDER THE 1913 ACT HAS AN INTEREST CHARGE BEFORE HE RECEIVES ANY BENEFIT.

In normal operation of the 1913 Act, there is only one bond on a parcel, no matter how many construction contracts there may be or how many progress payments. The total assessment is for the entire estimated cost--of all contracts, all acquisitions and all incidentals. It is argued by proponents of the 1913 Act (Page 183 of Sacramento transcript) that if proceeds of sale of bonds are not available, the contract specifications may contain the requirement that the contractor must wait for his money until such proceeds are available. I thrust aside any question of constitutionality in the matter of possible violation of Article XI, Sec. 18, because of incurring a debt beyond revenue of current year, by the city's agreeing to pay on the contract only at some future time when such funds are available. In the same way that under progress payments a contractor gets his money from time to time under the 1913 Act, the contractor under the 1911 Act only needs to borrow his money from time to time as his work progresses, and not all at once. If under 1913 the bonds are not sold all at once (as seems to be permitted under the loose language of the statute, Secs. 10602 and 10607 as amended) I criticise on ground of discrimination as to which of the 1911 bonds are sold from time to time. If all bonds are sold at once, the property owners are paying interest from the date of the bonds and in the case of a $1,000,000 contract, often at least eight months elapse before the work is completed.

If the receipt of bids for the construction work and the bids for the sale of the bonds, and the confirmation of the assessment are all synchronized for the same council meeting, and the incidentals are accurately computed, there might not be any great necessity at the end of the work, for either a refund or a supplemental assessment--except that such perfect mathematics are almost impossible.

### THE TENDENCY UNDER THE 1913 ACT IS TO PLAY SAFE AND PAD THE INCIDENTALS, CREATING A SURPLUS WITH POSSIBLE REFUND.

But if those operations are all synchronized as to time, there is the natural tendency to pad the incidentals to avoid any such supplemental assessment at the end of the work. This padding creates an interest loss to the property owner, one way or another, because any extra money above the actual incidentals is included in the amount of the bonds sold, carrying interest. This extra padding of incidentals remains idle in the city treasury. In the case of a million dollar contract it may well be that without any fraud whatsoever, this surplus may be $100,000 or 10% of the total cost. If such surplus is used for maintenance or repair, the city may be getting interest for several years, and the property owners may be paying interest for that same period of time before receiving a dime of benefit.

The proponents contend that the 1913 Act is more appropriate for large scale improvements or where drastically different kinds of work are involved, because separate contracts are permissible under 1913, but not under 1911. Often, however, the different kinds of work require staggering as to time under both acts, so that the borrowing by the 1911 contractor, takes place approximately at the same time that progress apyments would be made to the separate 1913 contractors. And as to expensive projects, there are dozens of projects in Southern California over $100,000 under the 1911 Act where competition is pretty fierce, with half a dozen bids for the work.

One way or another, under 1913 the property owner is either paying in cash long before he receives any benefit, or has interest accruing on the bond obligation long before he receives benefit, but under 1911, his interest starts after the benefit. If eight months go by before he receives benefit, and if the bond rate is 6%, the property owner is paying what might be called an extra 4% on the obligation with an entirely conjectural refund at the end.

In this connection, the 1913 proponents argue that their bonds often carry a 5% interest rate, while the 1911 bonds usually are 6%. But a bond house looking at the two bonds, where the security is exactly the same as to the value of the parcel assessed, is likely to bid the 1913 5% bond at a discount but to offer the contractor 98-1/2 of par or better on the 1911 6% bond if the district is sound. Obviously a bond with a 1% interest rate will not bring par, no matter how good the security.

I criticise the 1913 Act for its looseness, as tending to lead to abuses even if such abuses are unintentional. The 1913 proceeding that I referred to was originally estimated at about a million dollars when the tentative assessment was prepared, and then when construction bids came in at almost $200,000 less than the estimate, the assessments were scaled down, not by any such decrease in the contract bid, but only by about $112,000, whereas the incidentals, on account of engineering and legal fees as a percentage of the lower contract, would be reduced by perhaps another $30,000, thus probably creating a surplus at the end, of possibly over $100,000, designated to be for maintenance and repair. Such surplus would very likely remain idle in the treasury for years, with the temptation to raid it for some other city project. But the property owner would be paying interest, one way or another on this extra surplus. No fraud is involved, just possibly poor judgment. Such a situation is not likely to arise under the 1911 Act.

In particular, I refer to Sec. 10607, and ask how you are going to "call" a 1911 bond as provided under the Improvement Bond Act of 1915. Under Sec. 8750 the Treasurer can advance maturity under the 1915 Act, and must publish notice if owner is unknown and the holder may possibly receive 5% premium under Sec. 8752, but that hardly applies under 1911 Act.

## CHANGES IN THE WORK ARE DIFFICULT UNDER THE 1913 ACT

In some respects the 1913 Act would have more, but in several respects less, elasticity than the 1911 Act. Although constitutional, the assessment in advance of construction makes it impossible to make certain changes in the work after the assessment has been levied. In a sewer contract, one owner might desire two laterals instead of one as shown by the plans and for which one lateral the assessment has been levied. But to give him the extra lateral would be making a gift to him for which he has not been assessed. Conversely, he may have been assessed for two laterals but later demands one be eliminated. If the assessment has gone to bond in the hands of a bondholder, the amount of that bond can not be altered (to take care of the change in the work) without the infringement of the vested right of the bondholder.

## EVEN IF 1913 ACT IS AMENDED, CHANGES WILL STILL BE DIFFICULT

The proponents of the 1913 Act have advocated the enactment of provisions similar to the "Change of Work," Chapter 8.5 of the 1911 Act. In the same way that the bondholder has a vested right, the property owner has a vested right, ONCE THE ASSESSMENT IS LEVIED. Under the 1911 Act, desirable changes can be made with impunity because the vested right of the property owner is not created until the changes are made and the assessment levied. To explain in greater detail, if the assessment district is to be enlarged (whether to include more work or only the same work), there is no method of assessing the land in the enlarged district and even if detailed sections are enacted allowing a supplemental assessment for this enlarged area, such assessment might be inequitable to the owners in the original district. Conversely, to decrease the work and the district would leave outstanding bonds to represent work not done.

In the matter of changes in the work (allowed by Hannon v. Madden, 214 Cal. 251), it is true that the 1913 Act might seem to permit carte blanche, changes of all kinds without knowledge or consent of any already assessed property owner, and thus be more elastic than the 1911 Act. But that points to the easily concealed abuses of the 1913 Act. Property owners under the 1911 Act, have a hearing on their assessment BEFORE the assessment is levied, in the matter of the amount and the quality of the work done, and the compliance with the construction contract. Changes in the amount of the assessment are thus provided for. But under the 1913 Act, any objection as to the quantity of the work done is too late at any hearing that may be enacted under the 1913 Act after the work is done, because the amount of the assessment was crystallized at the beginning, and the holder of the bond can not be forced to accept a change in the amount of the bond without compensation. To illustrate, under the 1911 Act if a property owner complains that no sidewalk was installed on his frontage but the assessment includes such cost, he can complain at the 1911 hearing and if the Council rejects his complaint, he has the ground of abuse of discretion, something that frightens every lawyer. (Maxwell v. City of Santa Rosa, 53 C 2d 274). But if that situation exists under the 1913 Act, the property owner has had no opportunity to object on the ground of the inclusion in his assessment of the cost of work not installed and it is difficult to determine when, or how, any discretion was abused. The bondholder involved in this situation is an innocent party, with a vested right, and the property owner may be relegated to a damage suit against the city.

## POSSIBLE UNCONSTITUTIONALITY UNDER THE 1911 OR 1913 ACT.

As a constructive matter, I suggest Opinion from the Attorney General, as to whether at the hearing on the assessment, when the council seeks to increase one assessment because of some error in calculation, it is constitutional to make the increase, without some actual notice to the person whose assessment is sought to be increased. It is almost ridiculous to say that every one of perhaps hundreds of property owners must be personally present or otherwise run the risk that the council may make such increase. That would hardly seem like "due" process. Section 5364 requires the amount of the proposed original assessment (before any such increase) to be included in the mailed notice to the property owners and to some lawyers it has seemed doubtful, in this era of expanded communication, that jurisdiction to assess be conferred by the mere publication in a newspaper of the notice of hearing on an assessment when an owner can not even rely on the figures in the assessment roll as filed, which he must examine in the office of the clerk. In case of general taxation the county board, under Section 1605 Revenue and Taxation Code, can increase an assessment "after giving notice as prescribed by its rules." But no such notice seems to be required under the 1911 Act. Why not? It would delay the contractor in receipt of warrant, but I am raising point of constitutionality.

Respectfully submitted,

Roscoe R. Hess

ROSCOE R. HESS

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CHARLES N. KIRKBRIDE
1884-1911
KIRKBRIDE & GORDON
(JOSEPH B. GORDON)
1911-1929
KIRKBRIDE & WILSON
1929-1947
KIRKBRIDE, WILSON, HARZFELD & WALLACE
1947-1961

OF COUNSEL
JAMES H. WALLACE

October 16, 1962

Honorable Assembly Committee
on Municipal and County Government
Sacramento, California

Gentlemen:

At the hearing on September 24, 1962, we were given the privilege of responding to criticisms of the Municipal Improvement Act of 1913 which were to be offered by Roscoe R. Hess for the record. Mr. Hess has sent us a copy of his communication to the Committee, dated October 2, 1962, and this letter will reflect our view on the subject.

The first page of Mr. Hess' communication assumes that there will be specific amendments on five points. We will comment in order:

1. Prohibit acquisition of non-existent improvements.

   This is the subject of the Attorney General's Opinion No. 62/167, and if this opinion is correct, the Act already contains this prohibition. We agree, however, that a clarifying amendment would be desirable.

2. Require competitive bidding on all construction contracts.

   This is already clearly required under Secs. 10500 and following.

3. Require labor and material and faithful performance bonds in all cases.

   Faithful performance bonds are already expressly required under Sec. 10502, and labor and material bonds by Sec. 10509, incorporating the provisions of Ch. 3, Division 5, Title 1 of the Government Code.

4. Require competitive bidding on sale of improvement bonds.

5. Prohibit the inclusion in the assessment of any amount to represent a "Reserve Fund".

   There is no authority in the Act for such a fund under present law. Surplus funds may serve the same function as a reserve fund if they are applied as a credit to assessments under Sec. 10427.

Mr. Hess' basic premise seems to be that since assessments are levied in advance of the work under the 1913 Act, the property owner suffers additional cost in the form of interest payments on the assessment bonds.

This same cost must be incurred under the 1911 Act, because the contractor must borrow money to finance his contract. It seems to be suggested, on page 2*, that this interest cost, admittedly a cost under either Act, is greater under the 1913 because the assessment is for the entire estimated cost (including all contracts, all acquisitions and all incidentals), while the contractor "only needs to borrow his money from time to time as his work progresses" (p.2).

The 1911 Act contractor, under Sec. 5256, must advance all incidental expenses and acquisition costs (which could be up to 50% of the estimated improvement cost under Sec. 5102), in cash before being entitled to his contract. This requires immediate financing before the work even starts. The 1913 Act procedure customarily involves either cash assessment payments or advances by the entity to carry the project to the point where bond proceeds are available. This is usually the point where the first substantial progress payment is due, being 65 - 80 days after the award of contract.

The contractor is on notice, unless the entity is advancing funds, that payments are limited to assessments and bond proceeds. Since the waiting period is so short, we do not believe that it is even a factor in the bidding.

The question of constitutionality of award of contract before the bond proceeds are available, is raised and then thrust aside. We agree that this point should be thrust aside if it is raised at all because it has been established time and time again that the type of obligation incurred by an entity under an assessment procedure is not within the scope of the constitutional debt limit of Article XI, Sec. 18.

The point is also made that if the bonds are sold only as funds are required, there is a problem of discrimination in selecting which bonds would be sold first. In our experience, sales in divisions are common only in large projects, where the bonds are issued under the Improvement Bond Act of 1915. When this is done, there is no problem of discrimination and selection, because all of the bonds are secured by all of the unpaid assessments.

*-page number references are to Mr. Hess' letter.

Bonds issued under the 1911 Act in 1913 proceedings are usually delivered all at one time and all carry the same date, barring a partial reassessment. Funds not required for progress payments may be invested in specified public securities under Gov.C. Secs. 53600 et seq., and the income accrues to the construction fund.

In the few 1911 Act bond projects where delivery was in divisions, the project was a unit development and the proceeds of the bonds issued were used to finance the improvements in front of the parcels assessments against which were represented by the bonds, so that there was a coordination between the issued bonds and the finished improvement.

Proceeds of subsequent deliveries were used to complete the improvements in front of the lots represented by these bonds.

In some projects, the bond purchaser has been willing to advance all project costs as funds are required on demand of the council, and to recover his interest cost by adjusting the bond date or the discount. This is ideal because it keeps interim financing items to exact cost and still gives the entity the full advantages of 1913 Act work bids.

However, the foregoing points are de minimis. The really fundamental answer to the criticism regarding interest cost is that the 1911 Act procedure restricts bidding on the work to large contractors who can finance themselves and who have dealt with the 1911 Act enough to risk a bid under it.

I am struck by the statement on page 4 that competition consisting of half a dozen bids is described as "pretty fierce".

Bidding for the work in 1913 Act projects frequently produces over ten bids, and in one of our Southern California projects in the Apple Valley Foothills County Water District, in San Bernardino County, a total of 30 bids (15 pipeline, 10 pump plant and 5 storage tank) were received.

It is not at all unusual to attract no more than one or two bids under the 1911 Act.

The point is made, on page 3, that "The tendency under the 1913 Act is to play safe and pad the incidentals, creating a surplus with possible refund".

This statement is made without substantiating particulars. In our experience with the 1913 Act, there has been no "padding" of the costs, but rather a realistic adjustment of the assessment to cover the amount of the low bid, the incidental expenses and a reasonable contingency. The 1913 Act procedure makes it necessary that there be carefully prepared plans and specifications to the end that extra work be held to a minimum. Any surpluses remaining in the fund at the completion of the job, in our experience, are usually small amounts which are appropriately and promptly used for maintenance. When the surplus is of any substantial amount, it is refunded immediately.

This feature really serves as a deterrent on the city against carelessly prepared plans and against the indiscriminate allowance of extra work claims by the contractor. Under the 1911 Act, the property owners must pay the actual cost of the completed improvements regardless of any variation between the estimated cost represented to them at the time of the hearing on the resolution of intention, and the actual final cost. There is no limit on the amount of this difference in the Act, and the assessment could be for an amount substantially higher than the property owners expected. This is hardly a deterrent to careless allowance of extra costs.

In the same way that the assessment cannot be perfectly coordinated to cost under the 1913 Act (p.3), neither can the contractor perfectly estimate his interim financing costs at the time of his bid. So naturally, the tendency of the contractor is to pad his interim financing figures to protect himself. Since the bidding is much more restricted under the 1911 Act, all bidders may safely (and must if they are to survive) include such a margin of safety.

Unlike a 1913 Act surplus, which is normally refunded, the contractor's surplus, if it materializes, is retained by him.

Reference is also made, on page 4, to the interest rate. Under the 1911 Act, it is necessary that the council set the interest rate on the bonds in the resolution of intention. To the extent that this interest rate is too high or too low, the contractor's bid must make up the difference either by low discount if the interest rate is too high, or high discount if the interest rate is too low. In neither case does the property owner know how much of his cost is represented by discount and erroneous interest rate. Those who pay in cash are paying their share of the discount which may be aggravated by an erroneously low interest rate.

Under the 1913 Act, when the quality of the bonds makes it possible, the bonds are sold at public sale and, in an adequately secured project, after the work bids have been received and the cash payment period expired. Under these circumstances, the bond buyer knows exactly which bonds he is buying and their exact date and amount. He knows specifically what he has to sell at retail. Any reputable bond dealer will verify that this fact makes it possible for his bid to be substantially better than if he has to provide a bond commitment to a 1911 Act contractor at the time of bidding for the work. It will be at least months and maybe over a year before he gets his bonds; he has no idea which assessments will be paid in cash, nor the precise denominations of the bonds. This makes for wonderful business for banks during the construction period, but all at the owner's expense.

Recent public bidding for 1911 Act bonds issued to represent unpaid assessments levied under the 1913 Act has been producing a substantial number of bids (11 in Los Altos; 10 each in San Mateo County and Grass Valley). This quantum of competition must be producing the lowest possible rates available in the market without "padded" allowances for unknown factors.

On page 5, reference is made to Sec. 10607 and to Sec. 8750, relating to the calling of bonds in the manner provided in the Improvement Bond Act of 1915. This reference reveals a misunderstanding of the meaning of Sec. 10607.

Sec. 10606 through 10608, are the codified form of former Sec. 18-d of the uncodified act. This section was drafted by Ernest Wilson of our office in 1949, to authorize the issuance of bonds under the Refunding Assessment Bond Act of 1935. The contents of Sec. 10607, as part of old Sec. 18-d, refer to 1935 Act bonds, the purpose of the section being to make the 1915 Act procedure applicable to these bonds in the particulars mentioned. The section does not apply at all to 1911 Act bonds.

The discussion on page 6, relating to changes in the work being difficult under the 1913 Act, appears to be submitted on the assumption that there is no authority to make any changes in the assessment once it has been fixed. We believe this assumption is erroneous. Under Sec. 10313, the legislative body is authorized to make changes in the amounts of the assessments as well as in the boundaries of the district, the work proposed to be done, or the acquisitions proposed.

Notice and hearing is required when the changes involve an increase in the total amount to be collected. No hearing is required in the case of a reduction. If an assessment is confirmed and recorded and it is thereafter found necessary that an individual assessment be increased, this increase would necessitate an increase in the total, which would in turn necessitate a hearing under Sec. 10313. The matter of including additional laterals, mentioned on page 6, can be and is customarily handled by written request of the owner wishing the laterals, the total of which requests are formalized in a change and modification hearing held just before the issuance of bonds. It is true that after bonds have been issued, additional laterals can be handled only by cash transaction outside of the assessment.

If any work ordered is later deleted in such a way that a particular assessment should be reduced, the legislative body has full authority and in fact the duty, to order the assessment reduced, which order may be ex parte.

We believe that the "vested right" of the property owner, once the assessment is levied, is subject to the power of the council to order changes under the Act if such changes are made necessary as a result of necessary changes in the work.

The provisions of the 1911 Act for a property owners' hearing after the completion of the work, are pointed to as a great advantage, on page 7. We concede the desirability of a property owners' hearing on the question of whether the work has been satisfactorily performed, although, in the absence of fraud, the property owner has nothing to say in determining whether the work has been done according to the contract. Hannon v. Madden, 214 Cal.251; Hest v. Payne, 97 Cal. 108. However, as pointed out above, the work is ordered by the city council under the 1911 Act after a hearing based on overall estimates only, without disclosure of even estimated amounts of individual assessments. The work could legally cost twice as much as the amounts of the general estimates, but no matter what it costs, the property owner must pay it. This procedure really deprives the owner of any views on any question of cost, because he is obligated to pay it no matter what it is. His only argument is on the distribution.

On the point of possible unconstitutionality discussed on pages 8 and 9, it is submitted that the uncovering of possible errors and the informing of property owners is one of the prime purposes of the hearing on the assessment. It is clearly the duty of the property owner, upon receipt of his notice, to inform himself on the project and to determine whether any error has been made in the computation of his assessment. The very process of mathematical computation is susceptible to human error, and the property owner can reasonably be asked to accept his share of the responsibility to see that no error has been made. The process resembles the equalization hearing on the levy of general taxes, the constitutionality of which is beyond question.

During the late 1930s, Ernest Wilson of our office concerned himself most particularly with the problem of the high cost of proceedings under the 1911 Act. As city attorney of the charter city of San Mateo, he drafted, and the city council adopted, a procedure ordinance identical in all essential particulars to the current 1913 Act. In order to test the question of whether this procedure would produce economies, he conducted two parallel proceedings in the City, one analagous to the 1913 Act under the ordinance, and one under the Improvement Act of 1911. The two areas involved were comparable in size and quality of improvements. The proceedings were conducted at the same time. The 1911 Act resulted in assessments about 27% higher than the charter ordinance. Even if a suitable allowance for interest on prepayments made under the latter is allowed, so that the two figures are directly comparable, this difference is still most impressive.

We have consistently found that there is more bidding for the work under the 1913 Act and correspondingly lower contract prices. We have also found that competitive bidding under the 1913 Act for the bonds, with all details of the bonds known, has produced substantial economies in interest rate and discount. When the bonds are issued under the Improvement Bond Act of 1915, discounts are completely eliminated, and interest rates on recent sales have ranged from as low as 3.25% to 4-1/2%.

A comprehensive review of advantages and disadvantages of the two acts is included in our letter dated June 15, 1962, on pp. 185-188 of the Sacramento transcript.

To summarize, Mr. Hess' basic criticism of the 1913 Act* is an alleged difference in interest cost resulting from creating a cash fund in advance. We say this is picayune. All public contracts (other than 1911 Act contracts) are made after cash is available from the financing source. This necessarily involves (as does the 1911 Act) placing the cost of having money in advance on the taxpayers, but it establishes the cost in the open and at a known amount. Under the 1911 Act, everybody knows it's there but only the contractor knows how much.

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* Other than alleged "looseness" (p.5) which, if it exists, is easily remedied.

Our California courts have stated that the levy and collection of assessments in advance of construction of the improvements is "not only within the governmental power, but also consistent with the best public policy". Hayne v. San Francisco, 174 Cal. 185, 191, 162 P.625. Also see Simpson v. San Francisco, 174 Cal.815, 162 P.631, and Federal Construction Company v. Wolfson, 186 Cal.267, 199 P.512.

We agree.

Very truly yours,

for WILSON, HARZFELD, JONES & MORTON

KIJ:mh

cc-Hon. Clark L. Bradley
-Roscoe R. Hess, Esq.